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Serbiens ad Legem :

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REPORT OF PROCEEDINGS

BEFORE THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND IN

THE COURT OF COMMON PLEAS,

IN RELATION TO

A WARRANT

FOR

THE SUPPRESSION OF THE ANTIENT PRIVILEGES

OF

The Serjeants at Law.

WITH

EXPLANATORY DOCUMENTS AND NOTES.

BY

JAMES MANNING,

SERJEANT AT LAW.

London :

**LONGMAN, ORME AND CO.; AND A. MAXWELL;
AND TALBOYS, OXFORD.**

1840.



LONDON:
C. ROWORTH AND SONS, BELL-YARD,
TEMPLE-BAR.

TO
THE RIGHT HONOURABLE
CHARLES CHRISTOPHER LORD COTTENHAM,
Lord High Chancellor of Great Britain,
AS
A TRIBUTE OF RESPECT
TO
THE DIGNITY AND INTEGRITY OF HIS PUBLIC CONDUCT,
AND TO
THE ACKNOWLEDGED UNRIVALLED EXCELLENCE
OF
HIS JUDICIAL ADMINISTRATION.



PREFACE.

UPON the introduction into England, shortly after the Norman Conquest, of the system of feudal tenures, large portions of the kingdom, it is well known, were granted, or confirmed, to be held subject to a liability to perform military services; the actual cultivation of the soil being entrusted partly to the bondmen, or prædial slaves of the King, and of the military vassals holding immediately or mediately of the Crown, partly to the ignoble non-military freemen who held of the King, or of the military vassals, by the service of the plough,—the tenants in socage,—enroture.

An important feature in the feudal polity, which, though existing in other countries, appears to have received a more distinct development in England than in any nation of continental Europe, has however been little noticed either by the antiquary, or by the historian.

In consequence of the extensive confiscations which followed the unsuccessful attempts of the English to throw off the Norman yoke, a very large portion of the soil was held actually, and not by mere legal intendment, by grants from the Crown. Few, if any, of the forfeited lands, and certainly none of the larger possessions, were re-granted to be held by socage tenure. But instead of reserving military services, simply and generally, upon these re-grants, the lands were in numerous instances granted upon the terms of some *special* services to be performed by the party and his heirs. Lands held by

these special services were distinguished by the name of "serjeanties;" and the tenants of such serjeanties were originally called "serjeants."

As the ordinary military tenure merely bound the tenants to furnish so many knights armed for the field, it was part of the Conqueror's policy to provide for the government and guidance of the assembled knights, by the creation of serjeanties. Lands in Gloucestershire (*a*) were held by the serjeanty of being Lord High Constable of England. Lands in different parts of England were held by the serjeanty of leading armed men into Wales (*b*). Lands on the border of Wales were held by the serjeanty of defending certain castles (*c*). Lands in the northern counties (*d*) were held by the serjeanty of blowing a horn when the Scots entered England (*e*): and it was the duty of the serjeant, holding by this tenure, to lead the van of the army, in its progress towards Scotland, and to cover the rear, in the retreat (*f*).

Besides these special *military* services, another class of serjeanties was created with reference to the performance of services connected with the *administration of justice*. Lands in Leicestershire (*g*) were held by the serjeanty of being Lord High Steward of England. Many inferior offices, such as those of coroner (*h*), keeper of the peace (*i*), summoner (*k*), were held by serjeanty.

A third class of serjeanties was provided for the executing of offices, and the rendering of services, connected with the personal accommodation of the sovereign; all which, however humble their character, were considered, from the dignity of the person to whom they were to be performed, to be, as well as the two preceding services,

(*a*) *Post*, 302.

(*b*) *Post*, 287.

(*c*) *Post*, 287.

(*d*) *Post*, 292.

(*e*) Upon which tenure a Scottish writer observes, "Magnitudine, credo, periculi servitium extollente."—Crag. *Jus Feud. lib. i. tit. xi. sect. 5.*

(*f*) *Post*, 292 (*e*).

(*g*) *Post*, 27 (*b*).

(*h*) *Post*, 291.

(*i*) *Post*, 290, n.; 1 *Cal. Inq. post Mortem*, 25 (*a*).

(*k*) *Post*, 291; *Testa de Nevill*, 409.

equally noble with the tenure by the ordinary military service, and to be accompanied by the same feudal incidents, with the exception of escuage (*a*).

A fourth species of serjeanty consisted in the liability to perform some particular service relating to war or to the sovereign, but not requiring personal military service, or any service to be performed personally to the King (*b*). This tenure was classed with socage tenure, and in later times was called "petty serjeanty," to distinguish it from grand serjeanty, a name which before the fifteenth century had been assigned to the three preceding classes.

Some of the great vassals of the Crown imitated the sovereign (*c*) in the creation of serjeanties (*d*); and the right of a subject to create tenures by serjeanty is recognised by Bracton (*e*). In later times, however, we find the term serjeanty confined to tenures of the King; tenures created by a subject, corresponding with the first class of serjeanties, being now designated as tenures by knight's service; whilst tenures of a subject, corresponding with the three other classes, were treated as socage tenures.

The serjeant, or tenant in serjeanty, was bound, either to perform the special service himself, or to provide a person competent to perform it. It sometimes happened that the service was of too great dignity to be performed

(*a*) *Mad. Exch. cap. 16, s. 3.* Escuage being a composition for knight's service not performed, it would have been unreasonable to exact it from those who were under no obligation to perform that service.

(*b*) *Britton, cap. 66.*

(*c*) *Tout petit prince a des ambassadeurs,
Tout marquis veut avoir des pages.*

Says the moral of "La Grenouille qui se veut faire aussi grosse que le Bœuf."

(*d*) "Radulphus de Herleham tenet quartam partem ville de Oxewic (Norfolk) de comite Warrenne, *per serjantiam* mutandi unum asturcum."—*Testa de Nevill, 290 a.* Here the tenure under the Earl Warren is described as a serjeanty; but in the following entry this is omitted:—"Hugo Sturmi, Rogerus Falconarius, Willielmus Martel tenent duas hydas terre in ville de Nithubée, de veteri feoffamento, de comite Arundell' *per servicium* falconarie; et comes de rege."—*Ibid. 231 b.* Whereas, in speaking of a tenure of the King, the language is "*per serjantiam* falconarie."—*Ibid. 290 a.*

(*e*) 35 b.

by the person by whom the serjeanty was held ; in which case he was required to appoint a substitute to the satisfaction of the Crown (*a*) ; but in a more numerous class of cases the service was below the rank of the serjeant, in which case he was allowed to appoint a deputy. This was so much a matter of course, that in serjeanties of this description the service is commonly described as an obligation "to find" persons to do the duty (*b*). This frequently happened with regard to the inferior offices relating to the administration of the law, as in the ordinary case of a tenure by the service of finding bailiffs-itinerant (*c*). With respect to this particular appointment, and some few others, the name itself was transferred from the appointor to the appointee, and the designation of "serjeant" was given to the person by whom the service of the serjeanty was actually performed. Hence our serjeants at mace, and other similar officers in Normandy (*d*) and in England.

The tenant of a serjeanty in land, called in Normandy "serjenterie glebée" (*e*), not only had the profits of the serjeanty, i. e. the rents and issues of the lands, but was also entitled to the fees attached to the office. Sometimes these fees were granted, both in Normandy and in England, as a serjeanty in gross. This appears to have been frequently the case, with reference to offices connected with the administration of the law (*f*).

(*a*) See the proceedings on the coronation of James I., Sir F. Moore, 750.

(*b*) "Rogerus Bygot comes Norf. tenet terram que fuit Huberti Cordebof in Banigham et Eppigham per servitium *inveniendi* unum servientem cum lancia ad servitium domini regis."—Testa de Nevill, 290 a. "Idem comes tenet quandam partem terre que fuit Walteri Tusard in dictis villis, per serjantiam *inveniendi*, ad servitium domini regis, unum balistarium."—Ibid.

(*c*) *Post*, 289, 291.

(*d*) Chicaneau says (*Les Plaideurs*, acte ii. scène 4),
Et j'ai toujours été nourri, par feu mon père,
Dans la crainte de Dieu, Monsieur, et des *sergents*.

(*e*) *Post*, 300.

(*f*) "Une preuve encore plus sensible, de la haute considération où étoit parvenu le ministère d'avocat, c'est l'usage où l'on a été si longtems en France, de l'*inféoder*. L'on sçait que les Seigneurs avoient le plus grand soin de ne choisir pour vassaux que des personnes distinguées."—Henriot de Pensey, Introduction

In the Norman jurisprudence, plaintiffs and defendants were allowed to plead in the superior Courts by their "conteurs," the term "conter" being applied indiscriminately to the pleadings of the plaintiff and to those of the defendant. Upon the introduction of Norman pleadings into the Aula Regia or superior Court of England, it became absolutely necessary that the pleadings should be conducted by persons conversant in the law, and familiar with the language, of Normandy; and parties were not allowed to conduct their own causes (*a*). Permission to individuals to plead their own causes would, under such circumstances, have been attended with little benefit to the parties, and it would frequently have created great confusion. Little inconvenience appears to have resulted from this restriction.

The fees receivable by the "countor" appear to have induced the Conqueror, or some of his more immediate successors, to treat the office as a serjeanty in gross, and to assume, if they did not possess it before, the right of appointing to this serjeanty. This was effected by a royal mandate issued in the most solemn form, under the great seal,—by writ in respect of serjeants practising in the Aula Regia, and since in the Court of Common Pleas,—by letters-patent in respect of serjeants practising in Dublin. The serjeants appointed to represent the Crown in each county (*b*) appear to have been appointed, latterly at least, by letters-patent, with a fixed salary (*c*).

to Dumoulin, *Traité des Fiefs*. This author also speaks of the "*Feudum advocatiæ*," which appears to have been land granted by the lord on condition that the grantee should be of counsel with the grantor—"pour la défense du seigneur en jugement."

(*a*) *Vide post*, 268, 334.

(*b*) Originally all serjeants at law appear to have been "*servientes regis ad legem*." Latterly the term "*regis*" has been omitted, except with respect to those who, after being admitted to the degree of serjeant at law by virtue of the king's writ, were specially appointed by letters-patent to transact the king's business. The same person is sometimes mentioned as serjeant, sometimes as king's serjeant, with reference to the same period of his professional career. Compare Cary's case, *post*, 201, with Jones, *Index Exch. Records*, *Memoranda*, *Serviens*. So Lord Coke says, 2 Inst. 422, that by 14 Edw. III. c. 15, assises may be taken "before any justice of the one bench or the other, or the king's

(*c*) *Vide post*, 303 (*g*), 304.

This arrangement was probably generally satisfactory whilst the Aula Regia (*a*) constituted one entire Court; and even when that Court was divided into several branches, no inconvenience appears to have been felt, as all the different sections of the Court equally followed the King; but when, in the reign of Edward I., the regulation for holding Common Pleas in some certain place was put in force, those parties who had criminal business or writs of error depending in the Court of King's Bench, or revenue matters in prosecution in the Court of Exchequer, were put to inconvenience for want of counsel to plead for them, as often as the King, whose wanderings these two Courts still followed, happened to be at a distance from the place where the Court of Common Pleas was held. A statute having passed about the same time, enabling parties to appear by attorney (*b*) in the King's Bench and Common Pleas, Edward I. made an ordinance in Parliament, directing the Chief Justice of the Common Pleas to select 140 persons to act indiscriminately both as attorneys in the Courts of King's Bench and Common Pleas, and

serjeant sworn, which is intended of any serjeant at law, for that every serjeant is sworn; and albeit the king make choice of some serjeants to be of his counsel and fee, yet in a general sense all be called the king's serjeants, because they be all called by the king's writ." The reason here given by Lord Coke appears to be a very probable one, when it is considered that besides serjeants by the king's writ, there were also serjeants by tenure.

Summonses issued to the serjeants at law to attend as assistants to the House of Lords, are now confined to those who hold the rank of queen's serjeants. Formerly no such distinction appears to have been known. *Vide post*, 206. And see 2 Rot. Parl. 185 b, 197 b, 218 a, 321 a; 3 Rot. Parl. 3 a, 15 a, 32 a, 53 a, 243 a, 298 a, 579 b.

Daines Barrington seems to have cherished a singular antipathy to the whole race of serjeants, whose name he derives from "*serf*" "*gents*," citing the case of the unhappy Giocondo,—

" dolente,
Perché trovata avea la disonesta

Sua moglie in braccio d'un suo vil *sergente*."—Obs. on Stat. 249.

Whether this Welsh judge ever experienced at the hands of a serjeant the treatment which befel a justice of the Jews (*post*, 279,) does not appear.

(*a*) *Post*, 23, 28, 67, 171, 187, 195 n, 253.

(*b*) As to the pleas which might be pleaded by *bailiff*, see *Keilwey*, 117 b.

as advocates in the ambulatory Courts of King's Bench and Exchequer. The result of this arrangement does not appear to have been very satisfactory. The "attornati et apprenticii" may have found it more advantageous to practise in the capacity of attorneys at Westminster, than to follow the King's Bench and the Exchequer in the royal progresses, for the chance of business as advocates (*a*); and, possibly, the apprenticii were not persons of the rank and standing afterwards connected with that title, but students in an early stage of their legal pursuits. However this may have been, complaints were made (*b*) in Parliament, of the inconvenience arising to the suitors in these ambulatory Courts, from being deprived of the assistance of serjeants, and it was prayed, though without success, that for those reasons these Courts might be made stationary like the Court of Common Pleas.

The exclusive right of the serjeant-countors to practise in the Marshalsea Court was taken away by statute (*c*), in the reign of Edward III., upon a petition of the Commons, stating that justice was delayed therein in consequence of the non-attendance of serjeants.

The estate and degree of serjeant-countor being held by grand serjeanty, as an office relating to the administration of the law (*d*), the office itself and the privileges annexed to it have been treated as an *inheritance* (*e*).

The rank (*f*) and the privileges enjoyed by the serjeants at law have been successfully held out, by Fortescue (*g*) and others, as an inducement to persons of a higher station in society to enter the legal profession in England, than has been usual in any other nation than our own; and this circumstance has re-acted upon the profession itself, by bringing within its reach many important offices in the state.

(*a*) Vide Bro. Abr. *Nisi Prius*, pl. 10, 21.

(*b*) *Post*, 180.

(*c*) *Post*, 268.

(*d*) Co. Litt. 106 a.

(*e*) *Post*, 234.

(*f*) Bro. Abr. *Nosme*, pl. 5, 33.

(*g*) Fort. de Laud. c. 51.

To these combined circumstances the independence of the English bar (*a*), and its usefulness to the public, are perhaps chiefly to be attributed. And as events the most important are sometimes to be traced to causes from which no such results could have been reasonably anticipated, so there appears to be nothing extravagant in the supposition that England may owe her liberty, her laws, the high position which she takes among the nations, to the policy or to the caprice of the Norman sovereign who rescued the functions of an advocate from the discredit which attached to the pursuit of a non-military occupation, by surrounding the exercise of those functions with the acknowledged dignity of a feudal serjeanty (*b*).

“ ——— maneat nostros ea cura nepotes.”

(*a*) *Vide post*, 162.

(*b*) The same party was “serviens regis” by the mode of his appointment, and “communis narrator” (*post*, 281,) in respect of his employment. Hence “serviens-narrator,” serjeant-countor.

SERJEANTS’ INN,

2 March, 1840.

The editor is indebted to the kindness of Edward Smirke, Esq. for No. 45, to J. D. Blake, Esq. for No. 58, and to A. J. Stephens, Esq. for No. 76* in the Appendix.

In a note at the close of the argument (*post*, 168, n.), it is stated that the guianois d’or of Gascony were current in England. This statement was made from a vague impression that this had occurred. The only authority which has been found upon this point is a passage in Madox, *Baronia Anglicana*, where, though the payment in guianois d’or is recorded in England, the transaction may have actually taken place at Bordeaux.*

* “Sachent touz, que Mons. Gualhard de Dureffourt, Seigneur de Duras et de Blanquaffourt, ad receu del honore et sage Sire Mons. Johan Guedeneye, Conestable de Burdeux, en partie de payement des despens per lui faitz en alant vers mon tresnoble Seigneur de Lancastrre quant vint d’Espaigne, quatorse guianois dour et dys soudz de la mon[oye] currant a Burdeux; de laquiele somme le dit Seigneur de Duras se confesse pleinement estre paieiz et ledit Conestable ent quites, per cestes presentes seeles de son seel le xii jour du moia de Novembre, l’an de grace mil ccc. quatre xx et sept.” Ex Autographo in Thesauraria Rememoratoris Regis Scaccarii sui, viz. in Camera Longa, cista tertia ab introitu, et in filacio secundo, No. 14.—M. B. A. 159 (d).

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THE SERJEANTS' CASE.

In the Privy Council.

In the matter of the PETITION of the undersigned
SERJEANTS AT LAW.

CASE OF THE PETITIONERS.

A PETITION, of which the following is a copy, was presented to the Lord Chancellor by the Serjeants whose names are subscribed thereto, in the month of June, 1837, with a request that his Lordship would lay it before Her most Gracious Majesty: with which request his Lordship was pleased to comply.

“ To the Queen's most Excellent Majesty, the humble
Petition of the Undersigned, Petition to Her Majesty.

Sheweth :

“ That Your Petitioners have, for many years past, held
“ the state and degree of Serjeants at Law.

“ That for a period as far back as written records extend, the exclusive privilege of practising, pleading, and
“ audience, during Term time, in Your Majesty's Court of
“ Common Pleas at Westminster, has been enjoyed by the
“ Serjeants at Law.

“ That Serjeants at Law are created by writs of the
“ Kings and Queens of this realm, issued by the advice of
“ Their Council ; and the persons to whom such writs are
“ directed, though now usually applying for the same, are
“ still, according to the antient precedents, commanded by
“ the Crown to take on themselves the state and degree of

“ Serjeants at Law. And no persons can be Judges of the
“ superior courts of Common Law, until they have, under
“ such writs, taken on themselves this state and degree.

“ That this degree, and the prescriptive privilege of prac-
“ tising at the bar of the Court of Common Pleas, incident
“ thereto, have been continued from the most early times,
“ as conducive to the due administration of justice in this
“ court, and have been preserved in the greatest convul-
“ sions of public affairs.

“ That on the 25th day of April, 1834, a mandate, under
“ the sign-manual of His late most Gracious Majesty King
“ William the Fourth, was transmitted to the Lord Chan-
“ cellor (a), and by him communicated to the Lord Chief
“ Justice (b) and the other Justices (c) of the Court of
“ Common Pleas, containing as follows :—

“ ‘ WILLIAM R.

Warrant of 24th
April, 1834.

“ ‘ Whereas it hath been represented to Us, that it would
“ ‘ tend to the general dispatch of the business now pend-
“ ‘ ing in our several Courts of Common Law at West-
“ ‘ minster, if the right of Counsel to practise, plead, and
“ ‘ be heard, extended equally to all the said courts; but
“ ‘ such object cannot be effected so long as the Serjeants
“ ‘ at Law have the exclusive privilege of practising, plead-
“ ‘ ing, and audience, during Term time (d) in the Court of
“ ‘ Common Pleas at Westminster, We do therefore hereby

(a) Lord Brougham.

(b) Sir N. C. Tindal, Knt.

(c) Sir J. A. Park, Sir S. Gaselee, Sir J. B. Bosanquet, and Sir J. Vaughan,
Knts.

(d) The privilege enjoyed by the serjeants was exclusive audience, &c. in the Court of Common Pleas. That Court never sat except during term, and it was for that reason only that the privilege could not be exercised at any other period. But, in common parlance, the sittings of the chief justice of the Common Pleas in London and Middlesex to try issues in causes depending in that Court are called Common Pleas sittings. The proceedings before the chief justice at these sittings, however, are connected with the proceedings in the Court of Common Pleas in no other manner, than the trials of such issues before justices of assize under a commission of nisi prius, or the taking of inquests before a sheriff after judgment by default, are so connected.

Quære, whether these words may not be understood as importing, that although the exclusive privilege of the serjeants was limited to the sittings “ during term time,” the Court of Common Pleas sat out of term as well as during term time. If this part of the warrant is calculated to convey an impression that the privileges of the serjeants, instead of being co-extensive with the jurisdiction

“ ‘ order and direct, that the right of practising, pleading,
 “ ‘ and audience in Our Court of Common Pleas, during
 “ ‘ Term time, shall, upon and from the first day of Trinity
 “ ‘ Term now next ensuing, cease to be exercised exclu-
 “ ‘ sively by the Serjeants at Law, and that upon and from
 “ ‘ that day, Our Counsel learned in the law, and all other
 “ ‘ Barristers at Law, shall and may, according to their
 “ ‘ respective rank and seniority, have and exercise equal
 “ ‘ right and privilege of practising, pleading, and audience
 “ ‘ in the said Court of Common Pleas at Westminster,
 “ ‘ with the Serjeants at Law (a). And We do hereby will

and functions of the judges of the Court of Common Pleas, related to a part only of the business of that Court, the crown would appear to be misinformed.

The conveyance of an interest from the crown to A., is void, if it appear upon the face of the instrument that the king is deceived in his grant ; *à fortiori*, if by the same instrument, it appears that the interest conveyed to A. is one which was previously vested in B.

That the jealousy with which the Courts look upon a title derived from a royal grant, where there is any reason to suspect that the king may have been misinformed, has not diminished in modern times, may be inferred from the case of *Alcock v. Cooke*, 5 Bingh. 340, and 2 Moore & Payne, 625.

(a) The mandate contained also a provision as follows :—‘ And whereas
 ‘ We are graciously pleased, as a mark of Our royal favour, to confer upon the
 ‘ Serjeants at Law hereinafter named, being Serjeants at this present time in
 ‘ actual practice in Our said Court of Common Pleas, some permanent rank and
 ‘ place in all Our courts of law and equity, We do hereby further order and
 ‘ direct, that Vitruvius Lawes [since deceased], Thomas D’Oyly, Thomas
 ‘ Peake [since deceased], William St. Julien Arabin, John Adams, Thomas
 ‘ Andrews, Henry Storks, Ebenezer Ludlow, John Scriven, Henry John Ste-
 ‘ phen, Charles Carpenter Bompas, Edward Goulburn, George Heath, John
 ‘ Taylor Coleridge [now one of the justices of the Queen’s Bench], and Thomas
 ‘ Noon Talfourd, Serjeants at Law, shall from henceforth, according to their
 ‘ respective seniority among themselves, have rank, place, and audience in all
 ‘ Our Courts of law and equity, next after John Balguy, Esq., one of Our
 ‘ counsel learned in the law.’ It then proceeds, ‘ And We do hereby will and
 ‘ require you, not only to cause this Our direction to be observed in Our Court
 ‘ of Chancery, but also to signify to the Judges of Our other courts at West-
 ‘ minster, that it is Our express pleasure that the same course be observed in all
 ‘ Our said courts. Given at Our Court of St. James’s, this 24th day of April,
 ‘ in the fourth year of Our reign.

‘ To the Right Honourable

‘ Henry Lord Brougham and Vaux,

‘ Our Chancellor of Great Britain.’

At the time of the issuing of this warrant, Mr. Balguy was the junior King’s Counsel, and the fifteen Serjeants who are named therein, had precedence next to him. The effect of this “ mark of the Royal favour” was therefore, not to give to these Serjeants at the time any precedence which they did not already

“ ‘ and require You to signify to Sir Nicolas Conyngham
“ ‘ Tindal, Knight, Our Chief Justice, and his Companions,
“ ‘ Justices, of Our said Court of Common Pleas, this Our
“ ‘ Royal will and pleasure, requiring them to make proper
“ ‘ Rules and Orders of the said Court, and to do what-
“ ‘ ever may be necessary to carry this purpose into effect.’

“ That the said mandate bears only the sign-manual of
“ His late Majesty, is not sealed with any seal or signet,
“ and is not countersigned by any known public officer.

“ That Your Petitioners beg most humbly to represent
“ to Your Majesty, that the said mandate is illegal, inas-
“ much as it purports to alter the constitution and practice
“ of one of the superior courts of justice, by the authority
“ of the Crown alone.

“ That on this account, as well as from the said mandate
“ not being countersigned by any responsible officer, there
“ is reason to believe that His late Majesty King William
“ IV. was surprised in giving His signature to the said
“ mandate.

“ That the prescriptive privilege of the Serjeants at Law
“ cannot be abrogated by any authority but that of an Act
“ of Parliament (a).

“ That Your Petitioners had no opportunity of being
“ heard, before the said mandate was acted upon, and that
“ they have not hitherto brought its validity under dis-
“ cussion, from deference to the authority by which it
“ was promulgated.

“ That an opportunity has thereby been afforded of
“ judging whether any benefit has accrued to the public
“ from the alteration.

“ That Your Petitioners beg most humbly to represent
“ to Your Majesty, that experience has now shown, that

possess, but merely to prevent their being postponed to King's Counsel who might be thereafter made, and who, but for this mandate, would have had no right to be heard in the Court of Common Pleas at all. These serjeants therefore, could by no other means limit the amount of injury caused by the mandate, than by acquiescing in this part of it.

This mandate was published by the reporters in the several courts. See 1 Adol. & Ell. 122 ; 10 Bingham 571 ; 2 Crompt. & Mees. 559 ; 2 Dowl. P. C. 814 ; 4 Moore & Scott, 483 ; 3 Nev. & Mann. 635 ; 4 Tyrwh. 382.

(a) *Post*, pp. 22, 24, 65, 66, 78.

“ the benefit of the greater dispatch of business, expected
“ to accrue to the public from the alteration, has not been
“ realized.

“ That as the accession of Your most Gracious Majesty
“ to the throne of Your ancestors imposes upon those who
“ are to act under the said mandate, the necessity of con-
“ sidering its original validity, as well as whether it can
“ have any effect since the demise of His late Majesty,
“ Your Petitioners, being all the Serjeants at Law who
“ have not taken rank under the said mandate, most humbly
“ solicit Your Majesty’s gracious attention to the impor-
“ tant exercise of the Royal Prerogative by His late Ma-
“ jesty, in issuing the document dated the 24th day of
“ April, 1834 ; and that Your Majesty will be pleased to
“ cause the legality and expedience of the said document
“ to be duly investigated, under Your Majesty’s most
“ gracious sanction and direction.

“ And Your Petitioners will ever pray, &c.

“ W. TADDY, T. WILDE, R. SPANKIE, D. F. ATCHER-
LEY, H. A. MEREWETHER.”

The foregoing Petition was accompanied by a Memorial, addressed to the Lord Chancellor, stating more at large the grounds of objection of the Petitioners to the proceeding which formed the subject of the Petition, and from which they beg leave to submit the following extracts :—

“ It must be known to your Lordship, that upon the
“ 25th day of April, 1834, a mandate was transmitted from
“ His late Majesty King William IV. to the Lord Chan-
“ cellor, by whom it was communicated to the Lord Chief
“ Justice of the Court of Common Pleas, and his com-
“ panions, Justices of that Court, intimating His Majesty’s
“ pleasure, as in the Petition is set forth.

Extracts from
the Memorial to
the Lord Chan-
cellor.

“ This document, the undersigned humbly submit, is
“ entirely deficient in the proper form and solemnities
“ necessary to give it legal effect (a). It merely bears the

(a) 2 Instit. 555, 6 (Artic. super Chartas) ; *Ib.* 186 ; Vin. Ab. *Prerogative* (F b), (G b) pl. 10 ; Com. Dig. *Patent* (A), (B), (C) 7.—Attorney-General (Sir R. Sawyer) v. Vernon and others, 1 Vernon’s Reports, 370, 391 ; Vernon v. Benson (before the Attorney and Solicitor-General), 9 Mod. 47, *post* ;

“ King’s sign-manual—it is countersigned by no public
 “ officer—it passed through no public office of registry or
 “ record—it had not the sanction of the ordinary respon-
 “ sible Law officers of the Crown—it professes to make a
 “ great change in the constitution of one of the King’s
 “ superior courts, in derogation of forms which had existed
 “ beyond the period of prescription—it purports to confer
 “ upon the whole body of Barristers at Law privileges
 “ never before enjoyed by them, and to take from the order
 “ of Serjeants at Law privileges which have belonged to
 “ them beyond the period of legal memory. For these
 “ innovations the sign-manual is the only warrant.

* * * * *

“ The undersigned therefore humbly submit to your
 “ Lordship, that the document of the 25th April, 1834,
 “ was no sufficient authority for the changes which have
 “ been made in the Court of Common Pleas. But the
 “ undersigned further venture to submit to your Lordship,
 “ that these important alterations could not legally be
 “ effected by any act of the Crown, however regular in
 “ form. They apprehend that the power in this instance
 “ exercised is not known to the law—is not required for
 “ any object of royal dignity or public benefit, while in its
 “ principle it is inconsistent with the stability of institu-
 “ tions deemed essential to the constitution of this country.

“ If any thing in England can be considered as standing
 “ upon prescription, it is the Court of Common Pleas (*a*),
 “ and in connexion with it, the order of men holding the
 “ ‘state and degree of Serjeants at Law,’ as the sole prac-
 “ titioners at the bar of that Court. By the common law,

2 Bla. Comm. 346 ; 27 Hen. VIII. c. 11. And see the order of His late Ma-
 jesty George III. granting to the Attorney and Solicitor-General precedence
 over the two senior King’s Serjeants, which was made in Council, countersigned
 by the Secretary of State, by him transmitted to the Lord Chancellor, and by
 the Lord Chancellor communicated to the several Courts at Westminster ; 6
 Taunt. 424 ; 2 Maule & Selw. 253 ; 2 Ves. & Bea. 422 ; *post*, 19.

(*a*) 2 Inst. pp. 23, 24 ; 4 Inst. pp. 99, 100 ; 10 Co. Rep. preface, pp. 14, 20,
 24 ; Fortescue (by Amos), pp. 189, 192 ; Com. Dig. *Ley*, (D) 1, 2. Whitelocke’s
 Address to the Serjeants, called November, 1648, Whitelocke’s *Memorials*, pp.
 252, 254 ; Reeves’s History of English Law, vol. i. pp. 57, 317 ; vol. ii. p. 284 ;
 vol. iv. p. 121 ; Dugdale’s *Origines Juridicales*, pp. 38, 110, 136, &c. ; 1
 Madox’s History of the Exchequer (4th edition), pp. 787, &c.

“ founded on that prescription, the Judges of the land must
 “ be of the degree of the coif (*a*). Any irregularity in the
 “ writ (as in the return being immediate, &c.), or any call
 “ not in the established forms, have been holden illegal (*b*);
 “ and it was, not long since, deemed necessary by Act of
 “ Parliament (39 Geo. III. c. 113,) to enable the King to
 “ call Serjeants in vacation in order to be made Judges,
 “ and to supersede forms, which nothing but the Legis-
 “ lature could control (*c*).

“ The course of administration of justice therefore, in
 “ the Court of Common Pleas, in which, by the prescrip-
 “ tive usage of the Court, the Serjeants at Law had ex-
 “ clusive audience, was part of the constitution of that
 “ Court, with which the Royal authority alone could no
 “ more dispense, than it could dispense with the common
 “ law which required the Judges to be of the degree of
 “ Serjeant, and to be called to that state and degree in the
 “ established mode; or dispense with any other of the pre-
 “ scriptive forms in which justice has been administered.
 “ Nothing but an Act of the Legislature could alter the
 “ distinctive character of the Court of Common Pleas.
 “ Such appears to have been the opinion of Lord Coke, who
 “ says (4 Inst. 72 (*d*)), ‘ And seeing that none but Serjeants
 “ ‘ at Law can practise in the Court of Common Pleas,
 “ ‘ it is necessary in this Court (of King’s Bench), that
 “ ‘ apprentices (*e*), and other counsellors of law, might, by
 “ ‘ experience, enable themselves to be called Serjeants after-
 “ ‘ wards; otherwise Serjeants must want experience, which
 “ ‘ is the life of their profession. And the proceedings in
 “ ‘ that Court for so long a time, and under so many
 “ ‘ honourable Judges and reverend sages of the law, hath
 “ ‘ gotten such a foundation as cannot now, *without an*
 “ ‘ *Act of Parliament*, be shaken.’

“ Mr. Justice Blackstone (1 Comm. 267) appears to have
 “ entertained the same sentiments; for, treating of our courts
 “ of justice (the same subject as Lord Coke in his 4th Inst.)

(*a*) 4 Inst. pp. 75, 100; Preface to 10 Co. Rep. p. 24.

(*b*) See Introduction to Croke Charles, by Sir Harbottle Grimstone, p. 7;
 Sir W. Jones’ Reports, p. 63.

(*c*) See also 6 Geo. 4, c. 95.

(*d*) See also 4 Inst. pp. 124, 125.

(*e*) See Appendix, No. 1.

“ he says : ‘ At present, by the long and uniform usage of
 “ ‘ many ages, our Kings have delegated their whole judicial
 “ ‘ power to the Judges of their several courts, which are
 “ ‘ the grand depositaries of the fundamental laws of the
 “ ‘ kingdom, and have gained a known and stated jurisdic-
 “ ‘ tion, regulated by certain and established rules, which
 “ ‘ the Crown itself cannot now alter but by an Act of Par-
 “ ‘ liament.’

“ The Undersigned trust they do not exceed the bounds
 “ of respectful representation, in suggesting, that if the
 “ Crown could, by a proceeding like that under the King’s
 “ sign-manual in this case, or indeed in any of the most
 “ formal exercise of its power, grant the right of practising
 “ in the Court of Common Pleas generally to all Barris-
 “ ters, the Crown might, in the same manner, and in the
 “ exercise of the same power, open all the Superior Courts
 “ at Westminster to any class or description of persons, or
 “ to all persons without any description at all. The King
 “ is the fountain of honour, and the ‘ state and degree’ of
 “ Serjeant at Law is by all legal writers accounted a de-
 “ gree of honour ; but it never has been supposed that the
 “ Crown which confers honours, accompanied by privileges
 “ as incident to them, can again take away the privileges
 “ by which the honour was supported.

“ The King, ‘ by the advice of his Council’ (as stated in
 “ the writ), commands a man to take upon himself the
 “ state and degree of Serjeant at Law, and the command
 “ may be enforced under a pecuniary penalty (a).

“ This writ is now usually applied for ; but when it is
 “ granted and has been obeyed, can the privileges and
 “ incidents which the state and degree conferred, be by the
 “ same authority taken away from it ?

* * * * *

“ The Undersigned therefore humbly submit to your
 “ Lordship, that the warrant of 24th April, 1834, could
 “ not, and that no similar warrant, or any other form of
 “ authority less than an Act of Parliament, could or can
 “ effect the objects which that warrant professes to accom-
 “ plish, and that it is utterly null and void.

(a) And see 4 Rot. Parl. 107 b ; also stated shortly, Wynne’s Tracts, 253.

“ They do not presume to dictate in what manner Her Majesty should be advised to put these important questions in a train for deliberation and discussion ; but in cases of a like nature, the Crown has thought it not unbecoming to consult its Privy Council as to the legality and the expediency of measures which, under existing or supposed prerogatives, it has exercised, or been moved to exercise.

“ The Undersigned never wished to oppose, and never would set up their particular privileges in opposition to, a measure of substantial public utility. They do not believe, however, that the convenience of the public in the administration of justice has been promoted by the opening of the Court of Common Pleas ; nor do they believe that the dignity, efficiency, and independence of the Bar generally, would be permanently advanced by the abolition of a rank practically accessible to all respectable members of the profession, without the assistance of political interest or patronage.

“ The convenience of a fixed and resident Bar in each court, for the satisfactory despatch of business, must be known to all who have regularly attended courts of justice. The interruption and loss of time to the courts, and, in many instances, the delay and embarrassment in business, from the present system in the Superior Courts of Westminster, are the subject of general observation and complaint (a). It is found by experience, extremely difficult to obtain a fixed resident Bar in each court. To effect that object in the courts of common law, by arrangement among the practitioners, is impossible. By the legal constitution of the Court of Common Pleas, this principle was carried into effect, and a system established, which may be modified as to the Legislature may seem right, but which cannot, as the Undersigned venture to submit, be abolished, without injustice to them and inconvenience to the public.”

* * * * *

Her Majesty having been graciously pleased to refer the

(a) See also First Report of Commissioners to enquire into Practice of Courts of Common Law (1829), pp. 24, 26, &c., *post*, 21.

foregoing Petition to the Judicial Committee of Her most Honourable Privy Council, the Petitioners beg leave to submit, for the information of their Lordships, copies of the writ by which the Serjeants at Law are called to that state and degree, and the oath taken by them when created Serjeants, and to refer to the preceding extracts, in support of their objections to the legality of the order of the 25th April, 1834.

Constitution of Court of Common Pleas can not be altered but by act of parliament.

They further submit, that the constitution of the Court of Common Pleas as it then stood, including the exclusive right of the Serjeants at Law to practise in it, could only be altered by the Legislature. Whitelocke, upon the occasion already alluded to, after reviewing the authorities which prove the antiquity of the Court of Common Pleas, and the order of Serjeants at Law connected with it, concludes with this inference, deduced from them: that "all antiquity hath appropriated unto Serjeants at Law the practice of that great (a) and universal court (the Court of "Common Pleas)." In the year 1755, when a plan of opening the Court of Common Pleas was entertained by one of the Judges (b), it was proposed to effect the object by Act of Parliament; the project, however, was understood to be discountenanced by the Lord Chancellor (Lord Hardwicke) (c) and the other Judges, and never was publicly brought forward.

Incompetence of crown alone to make such alteration.

The Petitioners have already referred to the authority of Lord Coke and Mr. Justice Blackstone, to prove that the prerogative of the Crown does not extend to alter the constitution and proceedings of the established courts of justice. There is no precedent, from the earliest times, of any attempt to do so by the sole authority of the Crown. On the other hand, some of the most esteemed writers (d) on constitutional law have shewn, by a series of examples from Magna Charta downwards, the constant interposition, and sole competence, of Parliament, in regulating the proceedings of the courts of justice. The power of appearing

(a) "Magnus Bancus," see Appendix, No. II.

(b) Wynne's Tracts, 230.

(c) Ib. and 323, in notis.

(d) See Nathaniel Bacon on the Laws and Government of England, Pt. I. pp. 52, 118, 119, 177; Pt. II. pp. 56, 57, 141, 165, and particularly p. 166. Petty's Jus Parliamentarium, Pt. I. c. 6, p. 68.

by attorney in the superior courts was first given by the statute of Westminster 2, c. 10 (1285); seven years after which, as it appears by the Parliament Roll (a), an Order was made *in Parliament*, entitled, "*De Attornatis et Apprenticiis*," by which it was enjoined to John de Mettingham, Chief Justice of the Common Pleas and his companions (b), at their discretion to provide and ordain a certain number of these, in each county, to attend the Courts. Many statutes, as it is well known, have since passed to regulate the admission and the practice of attorneys. So also, to alter the returns of established writs (c), to give new ones, determining the time and manner of judicature, the effect of the adjournment of the Court of Common Pleas,—in certain cases allowing essoins in various actions, prescribing who should be Judges of Assize and Nisi Prius, altering the language of legal proceedings and records, and the duration of the terms, together with many other matters of a similar kind, to which it was considered that the constitutional prerogative of the Crown was unequal.

It was anticipated in 1755, that from the opening of the Court of Common Pleas, as then proposed (d), by Act of Parliament, there would be no more Serjeants; and it was suggested that the Act should contain a provision for that consequence, the probability of which experience seems to confirm. It is evident, indeed, that various results would ensue from there being no more Serjeants as an order of advocates, for which Parliament only could provide; and this shews, that Parliament is the proper and only competent authority to abolish, because Parliament alone can supply the place of what is abolished. Among these consequences is, the extinction of the order of Serjeants at Law, the only body of men, besides the Judges, qualified by law to give assistance in the administration of justice in civil cases on

Proposal to open
the Court in
1755.

(a) 1 Rot. Parl. 84 b, No. 22.

(b) *Post*, 45.

(c) 51 Hen. III. Stat. 2. And see 32 Hen. VIII. c. 21; 16 Car. I. c. 16; 1 Hen. III. Stat. 3. See also 52 Hen. III. c. 11, 12, (*Statute of Marlbridge*); 6 Edw. I. (*Statute of Gloucester*) c. 7, 8, 10; 13 Edw. I. c. 10, 17, 20, 24, 27, 28, 50; 2 Edw. III. c. 11; 36 Edw. III. c. 15; 24 Geo. II. c. 48; 6 Geo. IV. c. 83.

(d) By Willes, C. J. of C. P.

Attendance of
Serjeants on
House of Lords.

the Circuit, and whose services in that way are continually required and given; many others will occur. "It is among the privileges of the House of Lords," says Blackstone (a), "that they have a right to be attended, and continually are, by the Judges of the Courts of King's Bench and Common Pleas, and such of the *Barons of the Exchequer* as are of the *degree of the coif*, or *have been made Serjeants at Law*, as well as by the King's learned Counsel, *being Serjeants*." It is evident; therefore, that is in respect of their quality of Serjeants that this attendance is due to the House of Lords, for Barons not of the coif are not bound to it. Upon the entry of the appointment of Triers of Petitions, which regularly took place at the beginning of every Parliament (b), there follows in nearly a hundred instances in the six volumes of the Parliament Rolls, an entry of the Serjeants being required to give their assistance to the Triers; the usual form of which entry is, "Calling to them the Chancellor, Treasurer, and King's Serjeants if need be (c)." Besides which, in these Rolls are innumerable instances of their attendance in matters of judicature and other business. The Parliament Roll of 5 Hen. V. (d) shews, that upon the refusal of certain Apprentices of the Law (e) to obey the King's writ, calling them to take upon them the state and degree of Serjeants at Law, they were, by the assent of the Lords Spiritual and Temporal, summoned before Parliament, and there, having promised to comply, they were, by such assent of the Lords Spiritual and Temporal, discharged. The interference of the House of Lords to enforce obedience to the King's writ, seems to have arisen from their right to require the attendance of the Serjeants at Law.

If, however, the Court of Common Pleas can be opened by the sole authority of the Crown, the order of Serjeants is, in effect, abolished. The compulsory power of enforcing obedience to the mandate of the writ, which existed in contemplation of law, was connected with the privileges to

(a) 1 Bla. Comm. 167.

(b) 4 Hatsell's Preced. 79, 80, n.

(c) See 2 Rot. Parl. 226 a, 254 a; 6 Rot. Parl. 196 b.

(d) 4 Rot. Parl. 107, No. 10.

(e) Post, 35.

which Serjeants were called by the writ; and these being abrogated, the compulsory power must cease also.

If it were expedient to abolish the order of Serjeants at Law, and to open the Court of Common Pleas to barristers, which the Petitioners submit it is not, they contend that the interposition of Parliament is indispensably necessary, to provide for the public inconveniences, and the injuries to the rights of parties, which the simple abolition of institutions and usages, resting upon the most remote antiquity, must speedily disclose.

Intervention of
parliament.

It is therefore humbly hoped that Her Majesty may be advised, that the Serjeants at Law are entitled to exclusive audience in the Court of Common Pleas, and to order such measures to be taken, in regard to the premises, as will restore to the Serjeants at Law the rights and privileges which they have immemorially enjoyed.

W. W. FOLLETT. C. AUSTIN.

GEORGE, &c., To Our trusty and well-beloved A. B. of &c., Esq., greeting: Forasmuch as, by the advice of Our Council, We have ordained you to take upon you the state and degree of a Serjeant at Law on, &c., We, strictly enjoining, command you to put in order and prepare yourself to take upon you the state and degree aforesaid, in form aforesaid; and this you may in nowise omit, under the pain of One thousand pounds.

Form of the
Serjeant's writ.

Witness, Ourself, &c.

To Our trusty and well-beloved A. B., Esq.: a Writ to take up the state and degree of a Serjeant at Law.

Label on writ.

You shall swear well and truly to serve the King's people as one of the Serjeants at Law; and you shall truly counsel them that you be retained with, after your cunning; and you shall not defer or delay their causes willingly, for covetise of money, or other thing that may turn you to profit; and you shall give due attendance accordingly; so help you God.

Form of the
Serjeant's oath.

AT A MEETING
OF
THE JUDICIAL COMMITTEE

OF

Her Majesty's Most Honourable Privy Council,
COUNCIL OFFICE, WHITEHALL,
Thursday, 10th January, 1839.

PRESENT :

LORD COTTENHAM, C.
LORD WYNFORD,
LORD BROUGHAM,
LORD DENMAN, C. J.
LORD LANGDALE, M. R.
SIR LANCELOT SHADWELL, KNT. V. C.
LORD CHIEF JUSTICE TINDAL,
LORD ABINGER, C. B.
MR. BARON PARKE,
MR. JUSTICE VAUGHAN,
MR. JUSTICE BOSANQUET,
MR. JUSTICE ERSKINE,
STEPHEN LUSHINGTON, D.C.L. Judge of Court of Admiralty.

Legality of war-
rant of 24th
April, 1834.

SIR WILLIAM FOLLETT, for the Petitioners. The question mainly to be considered in this case, will be, whether or not, the mandate or order or letter, addressed by the late king to the Lord Chancellor in 1834, was a legal warrant, binding upon the Court of Common Pleas, and compelling the judges of that Court to admit to audience persons who had not been created to the degree of serjeant. That warrant is under the king's sign manual, but not under seal—it is not countersigned by any of the great officers of state, or by any responsible adviser of the crown. It is in the form of a letter from the late king to the then lord

chancellor, directing him to communicate the king's pleasure to the judges of the Common Pleas and to the other judges of the Courts of Westminster Hall. It will be necessary to bring under your lordship's attention in the outset the whole of that warrant and the form of it, and the directions given by the king to the lord chancellor, and by the lord chancellor communicated to the judges of the Common Pleas. The judges of that Court have acted in obedience to that warrant—there has been no discussion in that Court upon its legality or illegality. [Lord *Brougham*. There has been no objection taken to it in that Court.] No public objection has been taken to it, nor has there been any public discussion respecting it. The judges of the Court obeyed the warrant as coming from the crown. They have not only obeyed it in allowing audience to persons who have not been created serjeants, but they appear to have given a still larger effect to that order. They have expressed an opinion, that that order must have the effect of altering the rules and practice of the Court, and that, to a very considerable extent. It is not only with respect to pleading, but with respect to the rules of proceeding of the Court, which have existed from all time. If the order be legal and binding upon the Court in respect of the exclusive audience of the serjeants, the judges of the Court are also of opinion, that it virtually has had the effect of altering the rules of proceeding of that Court. This is therefore a question of considerable importance, not merely as regards the rights of the petitioners, but as involving a very great constitutional question; because I do not apprehend that this warrant can be supported, unless the king, by the mere exercise of his prerogative, has a right to interfere with antient Courts of justice—to interfere with the practice and proceedings of those Courts, and to control the judges in the discretion they may exercise with respect to the practice of the Court—and also to alter the practice, in a way, in which the judges themselves would not have the power to do. [*Tindal*, C.J. I think the only alteration was, as to the signature of pleas by counsel (a). The judges in their respective Courts

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Follett.

Acquiescence of
the Court of
Common Pleas.

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Follett.

Authority of
Court to alter
practice.

have the power of making regulations of that description.] The question submitted to your lordships, is not, whether the judges of the Common Pleas, in the exercise of *their* discretion, might have made such a regulation as this. I am by no means conceding that they might; on the contrary, I think your lordships will see, when you look into the origin of the Court, and the history of the right of the serjeants, that the judges would not have that power themselves. But that is not the question here. The judges have not affected to have such power—they have not assumed to exercise any such power themselves. So far as the judges were concerned, the old practice and course of proceeding in the Common Pleas would have remained as it always had remained. The judges made no attempt to alter it—they did not assume to have the power of altering it. But the question is this, whether the crown has a right to interfere with the discretion of the judges, and to compel the judges to alter the practice and proceedings of the Court in this respect. [Lord *Brougham*. If the crown has no such right, the warrant was a nugatory act, and the Court was not bound to obey it.] That is so, no doubt. [Lord *Brougham*. And its being revoked would not make it more a nullity than it is. Suppose the crown grants a patent for 28 years instead of 14, there is no necessity for the privy council to advise the crown to revoke that patent (*a*); no court of law would support an action for the infringement of it. If the warrant is a nullity, it stands in the same situation as it did before.] It was thought that it would be better to apply to your lordships in the first place, as being more respectful to the crown, and for the crown itself to be advised whether it had the right to exercise that prerogative; and if your lordships are of opinion that the crown had no right to exercise that prerogative, then, after a decision by so high a tribunal, there will be no necessity for discussing this question in the Common Pleas. [Lord *Brougham*. They could not prevent its being discussed there if any body chose to try it. *Tindal* C. J. It has been thought, as this is a prerogative exercised by the crown for the benefit of the public at large, that when doubts are entertained as to the legality of its

(*a*) See the Speech of Sir R. M. Rolfe, S. G., *post*.

exercise, the most respectful and best way would be to apply to the crown itself, and for the crown to be advised whether it had, or had not, the power to exercise that prerogative.] The serjeants state to the crown, humbly, their opinion that the warrant was illegal, and Her Majesty has referred to your lordships, for advice whether that warrant was legal. The warrant proceeds thus: "Whereas it hath been represented to Us."—It does not state by whom, or by what authority. The warrant contains an order from the king, that the serjeants shall not have the exclusive right of audience, during term time, in the Common Pleas; and an order, that the chief justice and his companions, shall make rules and orders, to carry the direction of the crown into effect. Then comes this important part: "And whereas We are graciously pleased, as a mark of Our royal favour, to confer upon the serjeants at law hereinafter named, being serjeants at this present time in actual practice in Our said Court of Common Pleas, some permanent rank and place in all Our courts of law and equity, We do hereby further order and direct, that" the gentlemen whose names are given "shall from henceforth, according to their respective seniority among themselves, have rank, place, and audience in all Our courts of law and equity, next after *John Balguy*, esquire, one of Our counsel learned in the law." It appears to have been intended, in a certain degree, to lessen the actual injury to the individuals then practising in the Common Pleas, not to give them any particular mark of royal favour, by conferring this rank upon them; but inasmuch as all barristers were to be allowed to enter the Common Pleas, and therefore every king's counsel subsequently made, would have taken precedence of serjeants, the effect of the warrant is, that king's counsel subsequently made shall take rank below these fifteen serjeants. Nothing was done in this case during the life-time of the late king; but the demise of the crown has very materially altered the position of this case. We are not discussing the exercise of the prerogative in the life-time of the king who exercised that prerogative. What is the effect of the demise of the crown, upon that part of the warrant which directs that certain gentlemen shall have

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Follett.

Warrant
of 1834.

Rank given to
the fifteen
serjeants.

Patents of king's
counsel and of
precedence.

Sir W. W.
Follett.

rank and precedence in all the Courts of Westminster Hall? If that had been under the great seal, upon the demise of the crown it would have ceased. If the king had created a king's serjeant or a king's counsel, on the demise of the crown all the privileges given to such serjeant or counsel would have ceased. They are kept alive by the statute of William and Mary (a) six months after the demise of the crown; but every patent of king's counsel and every patent of precedence, if not renewed, ceases at that period. This is not a patent under the great seal, or under any seal. Now it would be a matter of grave doubt, whether a letter signed by the king could have any longer duration than a grant by the crown under the great seal. Patents are issued under the great seal, and countersigned in the usual form; but no one would question, that the exercise of the prerogative in the ordinary form, creating a king's counsel, or giving a patent of precedence, would cease upon the demise of the crown. Here is a letter from the king, directing the lord chancellor to communicate, to the chief justice of the Common Pleas and to the other judges, His will and pleasure, that certain persons shall have certain precedence and rank. The king who sent that letter, has ceased to exist. What is the effect of that, upon the parties who had that rank and precedence given to them? [Lord *Brougham*. In the case of a patent of precedence, it is beyond all doubt. In a case which is analogous to that, though not by letters-patent under the great seal, of rank being given under the statute of precedence (b),—for instance, to A. B., whose father is pre-deceased, to take rank as a duke's son or an earl's son, though he never was such,—it is done by an order communicated to the public in the Gazette, that is never renewed by a sign manual communicated by the secretary of state to the public.] I apprehend that is no rank at all—it is a mere courtesy. [Lord *Brougham*. It is recognised by law (c).] If that were supposed to be applicable to questions of this sort, the effect would be this,

Grants of precedence to members of noble families.

(a) 7 & 8 Will. 3, c. 27, s. 21. And see 1 Ann. st. 1, c. 8; 6 Ann. c. 7, s. 8.

(b) In certain cases precedence is regulated by 31 Hen. 8, c. 10, and 1 W. & M. c. 21; but the power of giving precedence by letters-patent, is a flower of the prerogative at common law.

(c) See Appendix, No. III.

that the crown might now, by merely publishing an order in the Gazette, or writing a letter, give the same rank and precedence of king's counsel, and the privileges attached to the office, which would last longer than the life-time of the sovereign. [*Tindal*, C. J. The case that bears the closest analogy to this, is the warrant given in the time of George IV., by which the attorney and solicitor general ranked before the king's serjeants (a).] That was different in various respects. It was a document, countersigned by the secretary of state, by which the king directed that His own antient serjeant should not have precedence of his attorney and solicitor general. It was merely a statement, on the part of the crown, which of its own officers it wished to have precedence—a mere statement, that for the future, the king's business would be better conducted, if the king's antient serjeant had not precedence over the attorney and solicitor general. Whether that direction would be legal or not, is not the question. [Lord *Brougham*. Is it not to be presumed, that the legality of the warrant of 1814 having been doubted in 1814, that doubt was considered in the year 1834?] Serjeant *Shepherd*, who was the king's antient serjeant, being appointed solicitor general, the consequence was, that in his character of antient serjeant he would have led the attorney general, and therefore it became necessary to make some alteration (b). [Lord *Brougham*. At the same time they settled the question of precedence in some way with the king's advocate. *Bosanquet*, J. No, that remained as it was—he kept his place. The king's advocate takes precedence of the attorney and solicitor general now. Lord *Wynford*. But not of the king's antient serjeant (c).] I think the king's advocate would tell your lordships, that he takes precedence (c) of

*Sir W. W.
Follett.*

Warrant of
1814.

(a) 2 Maule & Selw. 253; 6 Taunt. 424; 2 Vesey & Beames, 422.

(b) It would appear that no difficulty could have arisen if the solicitor general had chosen to surrender his office of king's antient serjeant, instead of sacrificing the rank attached to that office, both as against himself, whom the sacrifice would scarcely affect at all, and as against his successors, whom it would materially affect. *Vide Serjeant Fleming's case, post, 37.*

(c) If this be so, the king's antient serjeant has precedence of the king's advocate, the king's advocate has precedence of the attorney and solicitor general, and the attorney and solicitor general have precedence of the king's antient serjeant. See Appendix, No. IV.

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Follett.

Expediency of
measure.

First Report of
Common Law
Commissioners.

every body at the bar. [*Vaughan*, J. In the queen's trial he retained the privilege, though he did not exercise it. *Bosanquet*, J. The question occurred, at a consultation of all the head counsel from the different Courts at Sir *Christopher Robinson's*, in 1817, the attorney and solicitor general attending. Lord *Brougham*. That was before 1814. Dr. *Lushington*. It was in 1817.]

This alteration in the Common Pleas, was made, upon the recital in the warrant that it was expedient to open the Court; whether it was or was not expedient, is not one of the questions referred by Her Majesty to the privy council. But it is stated in this petition, and the bar would bear testimony to it, that so far from being an advantage to the profession, it has turned out to be a disadvantage. Suggestions, undoubtedly, had been made before, of the propriety of opening the Common Pleas; but in the Report of the Common Law Commissioners, a contrary opinion was expressed. The commissioners said, that the privilege of the serjeants differed materially from that of the officers of the Exchequer; that the crown had the power to appoint an unlimited number of serjeants, and that the applications made to the crown to appoint serjeants, were rarely unsuccessful. "The rank in question, entitles a serjeant to audience, in all Courts, immediately after Your Majesty's junior counsel for the time being; but practically, it operates to exclude him from regular attendance in any other Court but the Common Pleas, it being well understood in the profession, that the rank of serjeant would not have been granted, if intended to be used for the purpose of obtaining precedence in any other Court. The officers of the Exchequer are, on the other hand, at full liberty to practise in all the Courts in which they are admitted as attorneys, and they do so accordingly. At the present moment, the number of serjeants is considerably greater than it has been for a long time past, and many gentlemen have lately been admitted, having abandoned their seats in the King's Bench, in the expectation of enjoying the benefit, in common with their brethren, of exclusive audience in the Common Pleas." [Lord *Brougham*. Do the commissioners say, that the coif is never taken with a view to any Court but the Common

Pleas? Is not it notorious, that men constantly take the coif, with a view to precedence on the circuit?] On the circuit, but not elsewhere. [*Vaughan J.* It was very much objected to, that Serjeant *Willes*, when he took the coif, sat down in the Court of Chancery (*a*).] The rank was applied for, very often, for the purpose of giving a lead upon the circuit, but then the person who so applied for it always abandoned the Court in which he had before practised, and practised exclusively in the Common Pleas. The commissioners say this, "with the exception that has been stated, (that is, the power of moving for new trials,) we do not think that the privilege which is enjoyed by the serjeants, is in any respect objectionable; for the easy access to the rank, sufficiently protects the public from all the evils which attend monopoly, and at the same time secures to the Court of Common Pleas the advantage of a distinct bar. Of this advantage we have already expressed our opinion. The distraction occasioned by the engagements of counsel in various courts, is prejudicial in various ways; the interest of the suitor, is liable to be affected by the absence of his counsel at critical periods of his case; additional counsel are often retained, and consequent expense incurred, for the purpose of securing the presence of one who is fully instructed; both these inconveniences are experienced, as we are informed, in a great degree in Ireland, where it is usual for the counsel to practise in all the Courts; and not a little in the Courts of Equity in this country; and the business in the Court is not unfrequently delayed, by the endeavours to accommodate the order of proceeding to the convenience of counsel, and by the necessity of reverting to matters which have passed in his absence; so long, therefore, as all barristers possessed of due qualifications, and willing to devote themselves to the practice of the Common Pleas, are enabled to obtain Your Majesty's writ calling them to the degree of serjeant, we believe that the character of the Court, for the satisfactory transaction of business, will be better sustained by the continuance, than by the abolition, of the exclusive privilege (*b*)."

The commissioners also refer to the proposition made by *Willes C. J.* to open the Common Pleas in 1755.

*Sir W. W.
Follett.*

Serjt. *Willes*,
in Chancery.

Extract from
First Report of
Common Law
Commissioners.

Inconvenience
of counsel being
engaged in
various Courts.

Attempt to open
the Common
Pleas in 1755.

(*a*) Vide *post*, 76.

(*b*) Vide *ante*, 9

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Follett.

Project of
Willes, C. J.
for opening the
Common Pleas.

Judges of K. B.
and C. P. to be
taken from ser-
jeants.

The alteration was then proposed to be effected in the only way in which it could be effected, by act of parliament. A very full account is given of that proposition, in Serjeant *Wynne's* Treatise on the degree of Serjeant at Law (a). He says, "Having heard it often asserted, that there was a bill ready drawn, and to be brought into the House of Commons by an honourable member of the law, to lay open the Court of Common Pleas, and to empower all barristers to practise in that Court as serjeants do now, I was a good deal surprised at such a report, and would hardly give any credit to it; especially when I found, upon enquiry, that the serjeants, who were most concerned in the event, were strangers to the design; and though it had been hinted to others, who were members of the House of Commons, and their opinions industriously solicited, yet the serjeants were thought unworthy of being consulted, or in the least apprised of it, except what they could pick up from common fame, or the casual discourses of the gentlemen of the law, who in general seemed as much surprised and unable to account for such an extraordinary innovation, especially, as it had industriously been spread abroad, that it had the consent and approbation of the serjeants themselves." He then states, that what gave rise to it was this; Lord Chief Justice *Willes* proposed to the other judges, that the Court of Common Pleas should be opened; and by letter of the 4th January, he sent the following plan: "that it be enacted, that all barristers may practise in the Court of Common Pleas, as the serjeants do now; and as the consequence of that probably will be, that there will be no more serjeants, that it be likewise enacted, that for the future, any barrister, of such a standing as may be thought proper, may be made a judge of any of the Courts at Westminster, and be put into any of the commissions on the respective circuits, though not a serjeant at law, and without being called to the degree of serjeant." And that proposed enactment is well worthy of consideration in this case, because, by the common law of this country, resting upon immemorial custom, the judges of the King's Bench and Common Pleas must be taken from the rank

(a) *Wynne's Tracts*, 227.

of serjeant. And by the statute (a) authorizing the holding assizes, serjeants may hold them, but barons of the Exchequer, if not of the degree of the coif, cannot hold them. [*Parke* B. Barons of the Exchequer have the degree of the coif to distinguish them from the cursitor baron.] Not only the cursitor baron, but the chief baron and the other barons (b), need not be of the degree of the coif; but if they are not of the coif, they cannot hold assizes. [*Lord Brougham*. The chancellor of the exchequer never is (c).] I presume not. But this act of parliament provided for a difficulty which the king's letter does not refer to at all—the ceasing of the degree of serjeant at law, and the necessity for making provision for the appointment of the judges, and the holding of commissions of assize by persons not of the degree of the coif; and *Willes* C. J. said, that “he should be glad if any proviso could be thought of, to give some particular privileges to the present serjeants, as that all special pleadings should be still signed by them, and that they should have pre-audience, or any other privileges that should be thought proper.” All the judges met, and the proposal was very strongly opposed by Lord *Hardwicke*; and the judges at that time, after mature deliberation, were of opinion against the plan. No bill was brought into parliament, and the scheme was dropped. [*Lord Brougham*. They confined it to motions for new trials.] No. [*Lord Brougham*. In point of practice, I suppose, that is what this alteration has been confined to.] By no means. The effect of it would be to destroy altogether the rank of serjeant, and in fact, the whole business of the Court is now transacted by other barristers as well as serjeants. [*Lord Brougham*. Do the suitors complain of the Court being thrown open?] The suitors complain sometimes of the counsel not being where they ought to be. [*Lord Brougham*. It might be suggested, that if the suitors feel

Sir W. W.
Follett.

New trials.

(a) Magna Charta, c. 12. And see Westm. 2, c. 30; Westm. 3, c. 5.

(b) Formerly the chief baron and the puisne barons were seldom men of the law; the Office of Pleas, out of which the modern common law jurisdiction of the Court of Exchequer has sprung, was originally confined to officers of the Court and actual accountants, and the little business transacted there required a legal baron, no more than the petty bag office required a legal chancellor.

(c) See Appendix, No. V.

*Sir W. W.
Follett.*

Clause for open-
ing the Common
Pleas inserted
in Central
Criminal Court
bill.

Pleadings.
Fines.

Attorneys.

any inconvenience, they have the remedy in their own hands (a).] To a certain extent they have. But the real question is, not whether this alteration may be expedient and politic, but, whether, if expedient, it should not be done by act of parliament. No power in this land, can alter the practice and proceedings in this Court, but an act of parliament; and the intention was, in this very case, to abolish the privilege by act of parliament; because, shortly before this warrant, a clause abolishing the exclusive privilege of the serjeants, was inserted in an act for the establishment of the Central Criminal Court (b); but it was not carried into effect in that way. By reference to the history of the Court, and to the history of the rank of serjeant, it will appear that the crown, by its prerogative, had no such power. The judges of the Common Pleas have obeyed the warrant, without discussing its legality; and have given it a force and effect, which must necessarily alter all the rules of practice of that Court. Pleas in the Court were always drawn by serjeants; fines were acknowledged before them. Supposing there had been no act of parliament for the abolition of fines, what effect would this warrant have produced—would a barrister have had the power of taking the acknowledgment of fines? [Lord *Wynford*. Do the serjeants ever do more, than examine parties to direct them to go before the judge (c)?] No more; but that was necessarily done by the serjeants. They took the acknowledgment of the fine; and if the crown had the power to do this, the crown would not only have the power to direct that the acknowledgment of a fine should be taken before a barrister, and not before a serjeant, but I know nothing to prevent the crown from saying,—before an attorney or before an attorney's clerk; or what is to prevent the crown from sending a letter from the Lord Chancellor, requiring the chief justice of the Common Pleas to give audience to attorneys as well as to barristers? [Lord *Wynford*. Why not direct them to hear any person as a counsel that the party chooses to send? Judges may

(a) This would be so if suitors in distinct causes had a common interest, or if they all employed one attorney; but when A. acts, he does not take into account the inconvenience which he occasions to B., C. and D., or the inconvenience which they may hereafter inflict upon him.

(b) See Appendix, No. VI.

(c) See Appendix, No. VII.

hear attorneys.] The crown may say, that they shall give audience to attorneys' clerks, or to anybody that chooses to appear there and say that he undertakes the cause on behalf of the party interested. If the crown has the prerogative of doing this, I am at a loss to see how the prerogative could be resisted in any case, or why, interference with the practice of the Court, may not be carried to any extent. If the crown has the power of interfering in one Court, it has the power of interfering in all; and what is to prevent the crown from sending an order to the House of Lords, not to hear barristers at the bar of their lordships' house? The House of Lords does not exercise the privilege of a court of judicature founded upon any higher authority than the Common Pleas (*a*). It stands exactly upon the same footing; and the crown, if it can make such an order as this is, may order the House of Lords or the King's Bench, to give to the serjeants exclusive audience. [Lord *Brougham*. It is admitted that, within certain limits, the crown has the power of directing any Court to hear one counsel before another. The crown can command the House of Lords, and the King's Bench, and the Chancellor, to hear A. B. before C. D., by creating A. B. king's counsel.] The crown has been in the habit of creating king's counsel; and the effect of creating king's counsel is, that the judges have given them audience before other parties. The king has exercised that power, the origin of which we know. Lord *Bacon* was the first king's counsel, according to the modern use of that term. Lord *Bacon* was created king's counsel, without receiving any salary or fee from the crown. It does not appear that there was any king's counsel, properly so called, before the time of Lord Keeper Guilford. The patent of precedence is of much more modern origin. Whether the judges would be bound to obey an order from the crown to hear one counsel before another, is another question. The crown may exercise a prerogative that is consistent with the usage of the Court. Lord *Mansfield*, without any order from the crown, laid down the practice of calling, on the last day of term, upon the stuff gowns, before the king's counsel. [Lord *Abinger*. It had been the

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Privileges of
House of Lords.

King's counsel.

(a) See Appendix, No. VIII.

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Serjeants' writ
and oath.

First objection :
Constitution
and proceedings
of an antient
Court affected.

practice to take the senior counsel, and to go through all his motions. Lord *Mansfield* altered that, by proposing it to the bar, and the king's counsel waived that privilege (a). I can hardly conceive that the Lord Chancellor might not, if he pleased, to-morrow say, that instead of hearing the king's counsel make all their motions, he would only hear one.] An exercise of the prerogative of the crown, acquiesced in by the judges, and acquiesced in by the bar, is one thing : it is another whether the crown can, against the consent of the bar, against the consent of the Court, make any such order as this, regulating the persons to be heard before the Court. The warrant is illegal on these grounds : first, the Court of Common Pleas is an antient immemorial Court, deriving its authority and its power from the common law of the land. As long as there are any authentic records or traces of that Court, the serjeants have formed a part of it, have had exclusive audience, and exercised other privileges and duties in it. They have always been created by the king's writ, and the form of that writ is immemorial—the serjeants have always been *sworn* to exercise their office, before they have been admitted to practise, and the form of that oath is immemorial. Instances also will be shown, in which the crown, or the parliament, has compelled persons to take upon them the degree of serjeant ; and by the common law or immemorial custom, the judges of the Common Pleas and King's Bench, are taken from the serjeants. After establishing these two propositions, I will submit that this warrant is illegal on two grounds : first, that it affects the constitution, and proceedings, and practice, of one of the most antient Courts of common law of this country. The crown has no prerogative which can authorize it to interfere, in any way whatever, with the proceedings and practice of one of the antient Courts of common law. The patents of king's counsel, or the patents of precedence, form no exception to that proposition ; and independently

(a) The alteration here alluded to is, not that of beginning with the juniors in the back row on the last day of term, but that by which counsel now make only one motion at a time. Formerly, the counsel first called upon, went through all the motions which he had to make, before any other person could be heard. Till within the last few years, the practice in the Exchequer was, to allow each counsel to make *two* consecutive motions.

of this warrant's being illegal, or at least not warranted by the prerogative of the crown, I submit, that it is incapable of being supported, as being an interference with an antient office, and as affecting immemorial privileges exercised by the serjeants in that Court. Such an interference, on the part of the crown, with a Court of justice, or with the privileges of a state and degree, or office, like that of a serjeant, is wholly without precedent. The Court of Common Pleas, as to its origin, rests altogether on the common law ; all its powers and authorities are derived from the common law, as also all its practice and proceedings. The course of the practice and proceedings of that Court, has been altered by several statutes ; but as far as they are not regulated by any statute now extant, those proceedings and that practice are derived, entirely, from the authority of the common law. The history of most of these Courts is given by *Blackstone*, who says (3 Bla. Comm. 37), " By the antient Saxon constitution, there was only one superior court of justice in the kingdom ; and that court had cognizance both of civil and spiritual causes ; viz. the Wittena-gemote, or general council, which assembled annually, or oftener, wherever the king kept his Christmas, Easter, or Whitsuntide, as well to do private justice, as to consult upon public business. At the conquest, the ecclesiastical jurisdiction was diverted into another channel, and the conqueror, fearing danger from these annual parliaments, contrived also to separate their ministerial power, as judges, from their deliberative, as counsellors to the crown. He therefore established a constant court in his own hall, thence called by *Bracton* and other antient authors, Aula Regia, or Aula Regis. This Court was composed of the king's great officers of state, resident in his palace, and usually attendant on his person, such as the lord high constable(a) and lord mareschall(a), who chiefly presided in matters of honour and of arms, determining according to the law military and the law of nations. Besides these there were the lord high steward(b),

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Second objection :
Interference
with an antient
office.

Court of Com-
mon Pleas.

Wittena-ge-
mote.

Aula Regia.

(a) Com. Dig. tit. Office (E 2), (E 3) ; 2 Inst 26.

(b) The barony of Hinkley was held by the service of being lord high steward of England, seneschallus, or dapifer, Angliæ. In the German empire the pala-

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Aula Regia.

Common Pleas.

and the lord great chamberlain (*a*), the steward of the household, the lord chancellor, whose peculiar business it was, to keep the king's seal, and examine all such writs, grants, and letters, as were to pass under that authority, and the lord high treasurer (*a*), who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices, and by the greater barons of parliament, all of whom had a seat in the aula regia, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty." Then he goes on to state, "this great universal court being bound to follow the king's household in all his progresses and expeditions, the trial of common causes therein, was found very burthensome to the subject; wherefore King John, who dreaded also the power of the justiciar, very readily consented to that article which now forms the 11th chapter of Magna Charta, and enacts that—*communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo*. This *certain* place was established in Westminster Hall (*b*), the place where the aula regis originally sate when the king resided in that city, and there it hath ever since continued; and the court being thus rendered fixed and stationary, the judges became so too; and a chief, with other justices of the Common Pleas, was thereupon appointed, with jurisdiction to hear and determine all pleas of land, and injuries merely civil, between subject and subject." Then he goes on to say this:—"The aula regia being thus stripped of so considerable a branch of its jurisdiction, and the power of the chief justiciar being also considerably

tinuate was held by the same service, the elector palatine, as count-palatine on the Rhine (*pfalz-graf am Rhein*), being *seneschallus et dapifer* (*erztruchsess*) of the empire. The barony of Hinkley came by marriage to the earls of Leicester, and both barony and earldom were held, with the dukedom of Lancaster, by John of Gaunt, and vested in the crown when the crown was usurped by his son Henry IV. By Henry IV. the office of lord high steward was granted to his son Thomas, duke of Clarence, in tail male. Since the death of that prince, a lord high steward has been appointed, only *pro hac vice*. This is not surprising, if, as stated by Lord Coke, that officer had authority to survey and to rule, *sub rege, totum regnum, et omnes ministros legum, tempore pacis et guerræ*; 4 Inst. 58, 59. And see Madox's Exch. 34, 35; Com Dig. tit. Office (E 4); Foster, 248; Pictorial History of England, i. 567.

(*a*) Com. Dig. tit. Office (E 1), (E 7).

(*b*) Appendix, No. IX.

curbed by many articles in the great charter, the authority of both began to decline apace, under the long and troublesome reign of King *Henry* 3; and in further pursuance of their example, the other several offices of the chief justiciar were, under *Edw.* 1, (who new-modelled the whole frame of our judicial polity), subdivided and broken into distinct courts of judicature." Then those distinct Courts are there stated,—the House of Lords, the Court of King's Bench, the Court of Exchequer, and all the other great Courts which now administer justice between subject and subject; so that all these Courts stand exactly upon the same authority. There is no more authority, for the House of Lords to exercise an appellate jurisdiction, than for the Common Pleas to exercise the jurisdiction it exercises, or for the King's Bench to exercise its jurisdiction. All are based upon the common law of this country,—all derive their authority from the same source; and therefore if the crown can, by its prerogative, interfere with one of those Courts, it has a right to interfere with all or any of the other Courts. In 2 Inst. 22, Lord *Coke* says, "the Court of Common Pleas is the lock and key of the common law;" and after an observation upon Magna Charta, and upon the judges being stationary in that Court, he says, "It is manifest, that this Court began, not after the making of this act, as some have thought, for in the next chapter, and in divers others of this very great charter, mention is made de justiciariis nostris de banco, which all men know to be the justices of the Court of Common Pleas, commonly called, the Common Bench, or the Bench; and Doctor and Student saith, that it is a Court created by custom." And he says, "It appeareth by our books, that the Court of Common Pleas was in the reign of *Henry* 1 (a)—that there was a Court of Common Pleas in anno 1 *Hen.* 3, which was before this act; Martinus de Pateshull was, by letters-patent, constituted Chief Justice of the Court of Common Pleas, in the first year of *Hen.* 3. It is resolved by all the judges in the Exchequer Chamber, that all the Courts, viz. the King's Bench, the Common Pleas, the Exchequer, and

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Common Pleas.

(a) In the margin Lord *Coke* refers to 4 *Edw.* 3, 49, and 39 *Edw.* 3, 21. Both references will be found to be inapplicable, and are probably misprinted.

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the Chancery, are the king's Courts, and have been, time out of memory." To the same effect is 4 Inst. 99 (a). Rolls of proceedings in the Common Pleas, much older than the reign of *Edw. 1*, are in existence (b); but from that period the rolls of that Court are perfect. There is no act of parliament, giving the Common Pleas exclusive jurisdiction in pleas of land; and yet all real actions must be brought in that Court. By what authority? By the common law. All appeals must be taken to the House of Lords. By what authority? By the common law; by no statute. [Lord *Wynford*. There was formerly no act of parliament for trying prisoners at the Old Bailey.] And so it is with all the proceedings of Courts,—the mode of trial, the mode of pleading, the mode of appearance,—all is regulated by the common law and custom, except where an act of parliament has interfered; and there is no instance to be found where the king, by his prerogative, has interfered with any one of those courts. The course of proceeding in the Courts, as well as the jurisdiction of the Courts, rests upon the same authority as the prerogative of the crown itself. They are all founded upon the common law and usage. There is no other authority for any of them, or indeed for the greater part of the law,—the descent of lands and the mode in which estates are held,—than the common law. The first part of the proposition cannot be disputed for a moment. Then comes the next question, the antiquity of the rank of the serjeants, and then their privileges. The oldest book in which a reference is made to this rank, appears to be, the *Mirror of Justices*. Your lordships are aware that the date of this book is uncertain. Chapter 2, sect. 5, treats of countors or pleaders. That word, countors, is defined in the 10th book, as being derived from the mode in which serjeants practised, and are now, in fact, in the habit of practising. Serjeants are all admitted in that way now, *by counting*. The words of the author are these: "There are many who know not how to defend their causes in judgment, and

Antiquity of
serjeants.

Mirror of Jus-
tices.

(a) See a curious record in C. P. in 8 *John*, referring to a record temp. *Henry 2*, in a Court *before the king, his barons and justices*. Appendix, No. II.

(b) See Appendix, No. II.

there are many who do; and therefore pleaders are necessary, so that, that which the plaintiffs or actors cannot or know not how to do by themselves, they may do by their serjeants, attorneys or friends. Countors are serjeants, skilful in the laws of the realm, who serve the common people to declare and defend actions in judgment for those who have need of them, for their fees" (a). Then he says, " Every pleader of others' causes ought to have a regard to four things: first, that he be a person receivable in judgment, that he be no heretic, excommunicate person or criminal, or a man of religion, or a woman, or within the orders of a sub-deacon, or a beneficed clerk who hath cure of souls, or under the age of 21 years, or judge in the same cause, or attainted of falsity in his place. Another thing is, that every countor is chargeable by the *oath*, that he shall do no wrong or falsity contrary to his knowledge, but shall plead for his client the best he can according to his understanding." That cannot apply to barristers, who take no such oath; but the form of the serjeant's oath, which is now taken, and which, I have stated, is an immemorial form, is this, " You shall swear, well and truly to serve the king's people, as one of the serjeants at law; and you shall truly counsel them that you be retained with, after your cunning; and you shall not defer or delay their causes willingly, for covetise of money, or other thing that may turn you to profit; and you shall give due attendance accordingly. So help you God." Then the next thing is, that he put no false dilatories into Court, or false witnesses,—nor move nor offer any false corruptions, deceits, leasings, or false lies, nor consent to any such, but truly maintain his client's cause, so that it fail not by any negligence or default in him,—nor by any threatening hurt or villany, disturb the judge, plaintiff, serjeant, or any other in Court, whereby he hinder the right or the hearing of the cause. The fourth thing is his salary, concerning which, four things are to be regarded; first, the greatness of the cause; secondly, the pains of the serjeant; thirdly, his worth,—as his learning, eloquence and gifts; and fourthly,

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Countors.

Serjeants' oath.

Dates.

Salary.

(a) See Appendix, No. X.

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Antiquity of
serjeants.

Serjeants
created by writ.

the usage of the Court (a). Persons under the designation of countors or serjeants, therefore, were at that time known to the law, and appointed to plead for other persons in their causes. In the preface to 10 Co. Rep. Lord *Coke* says, "concerning the antiquity of serjeants at law, it is evident by the book of the Mirror of Justices, lib. 2, Cap. des Loiers, which treateth of the laws of this realm, and the ministers thereof long before the conquest (b), that serjeants at law were, of antient times, called narratores, countors or counteurs; because the count or declaration comprehended the substance of the original writ, and the very foundation of the suit, of which part, as of the worthiest, they took their denomination, and is all one in effect with that which in the civil law is called libellus; and they lost not that name in the reign of King *Edw.* 1, as it appeareth by the statute of Westminster 1, cap. 29, anno 3 *Edw.* 1, for there he is called, serjeant-countor, serviens-narrator, and by the statute, Articuli super Chartas, cap. 11, anno 28 *Edw.* 1, "Nest my a intender, que home ne poit aver counsel des countors et des sages gents, pour lour donant (c), where under this word "countors," serjeants at law are included; and, until this day, when any proceeds serjeant, he doth count in some real action at the bar of the Court of Common Pleas, and under these words (sages gents) are included apprentices at law (c). But since the reign of *Edward* 1, they have always been called, servientes ad legem, for their good service to the commonwealth by their sound advice in law; and as, in antient time, they that preserved and kept the peace were called, servientes pacis, or ad pacem, so these men are called, servientes legis, or ad legem, or in legibus, &c. (d); and in that antient treatise of the Mirror of Justices, ubi supra, countours are described to be, serjeants skilful in law of the realm, which serve the common people to pronounce and defend their actions in judgment, for their fees, whose duty is there excellently described. This proveth the great antiquity

(a) In Appendix, No. XI. will be found a copy of an indenture, by which Mr. Serjeant *Yaxley* was retained to go to the assizes at Derby, Nottingham and York, in the reign of *Edward* IV.

(b) See Appendix, No. XII.

(c) See Appendix, No. XIII.

(d) See Appendix, No. XIV.

of the serjeants at law. The manner of the creation of serjeants is also most antient, for it is by writ. I beg attention particularly to this, that all the serjeants are created by the king's writ. They stand totally different from barristers, or persons practising in other courts. The creation of the degree of serjeant is by the writ of the king, "by writ, which is commonly found in very antient registers, and continued to this day in this form," which he then sets out (a), "To Our trusty and well beloved —, greeting. Forasmuch as, by the advice of Our Council, We have ordained you to take upon you the state and degree of a Serjeant at Law, on &c., We, strictly enjoining, command you to put in order and prepare yourself, to take upon you the state and degree aforesaid, in form aforesaid; and this you may in no wise omit, under the pain of one thousand pounds." Lord Coke, in commenting upon that, says (b), "wherein for the dignity of him it is to be observed, 1, that he is called by the king, by advice of his council in that behalf. 2. By the king's writ. 3. The writ is directed to him in the plural number, "Vobis," a special mark of dignity. 4. That he is called *ad statum et gradum Serientis ad legem*." And in 8 *Henry VI.* cap. 10, of the Serjeant it is said, "when he taketh the same *state* upon him." And in 8 *Edward IV.* cap. 2, "*al creation des Serjeants del ley*" &c., and creation is ever applied to dignity. But it is true that the said writ is not put into the printed register, no more than writs to call any to be a baron of the realm or of higher dignity, for that those writs originally are only *de gratiâ Regis*, and such as are published in the printed register are, originally, *de jure legis*." Then he makes an observation with regard to the precedence of the serjeants, and states that they are entitled to take precedence over the Masters in Chancery. The 3 *Edward I.* c. 29, treats of serjeants at law as a well known body. [Lord Brougham. You have nothing to shew, that it is necessary that a person called to the degree of a serjeant by the writ of the crown, should be an apprentice (c).] The habit, and the practice, is, that a person created a serjeant, should be of a certain

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Serjeants' writ.

Lord Coke's
four marks of
dignity whereby
Serjeants are
distinguished.

Precedence
over Masters
in Chancery.

Apprentice.

(a) *Ante*, 13. (b) Preface to 10 Co. Rep. (c) See Appendix, No. I.

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Triers of peti-
tions.

Origin of king's
Serjeants.

standing at the bar. [Lord *Brougham*. That is mere usage. Lord *Wynford*. Justice *Buller* was made a judge before he had been five years at the bar (a). Lord *Denman*. Seven years is the usual term (b). *Tindal*, C. J. You will find it stated in *Fortescue* that the *graver* (c), persons among the barristers shall be the serjeants.] There are several entries in the early parliamentary rolls (d), by which, at the opening of every parliament, certain triers of the petitions of the people are appointed, consisting of some of the great men of the realm, and the serjeants form a part of those triers (e), an additional proof of the antiquity of the office, and of the privileges and duties attached to it. The treasurer, the lord keeper, the seneschal (f), and the serjeants,—Serjeants le roy. [Lord *Brougham*. Those are the king's serjeants. I believe, no writ ever goes to the serjeants, but to the *king's* serjeants (g).] I believe, writs are issued to the king's serjeants. [Lord *Brougham*. And also to the king's counsel.] No. To the attorney and solicitor-general, and to the king's serjeants, writs are sent at the opening of every parliament. Whether writs were sent to the king's serjeants only, and not to other serjeants, is unimportant to the antiquity of the office and of the duties and privileges attached to it. The authorities, which shew that the judges of the King's Bench and of the Common Pleas, must, by the common law, be of the degree of the coif, will be found in 4 Inst. 75, 100. *Dugdale* (h) says, "And we find in the third of *Edward* II. (1310), *Roger de Scotre* and *Edmund Passelegh*, were, by special writ, assigned to be the king's serjeants,—*sergeants assignes as ples le Roy et a ses busoines*, saith the record. In which employment both they and their successors gained such high esteem, that from the 20th of *Edward* III. (1346), those who were then in that place, viz. *Rob. de Thorpe* and *Henry de Grene* had summons to parliament to sit amongst the justices of both benches, and were specially exempted from

(a) In May, 1778.

(b) For being made serjeant, *semble*.

(c) De maturioribus.

(d) Rot. Parl. vol. i. 159 a, 182 a, 350 a, b, 444 b, vol. ii. 68 a, &c. &c.

(e) *Ante*, 12.

(f) Lord High Steward, *ante*, 27 (b).

(g) See Appendix, No. I. XIII. XV.

(h) *Dugdale's Origines*, 110.

serving on those eminent trials called the grand assize, but where there were no knights (a) in the county; which sheweth that their rank and place was little inferior to that degree of honour. Whereunto Sir *Edward Coke* addeth that they precede those who sit on an high bench in Westminster Hall, id est, Masters of the Chancery. It should seem, that this state and degree of serjeant, considering their grand feasts made at the reception thereof, and the large retinue for attendance they then had, was antiently so chargeable, as that the learned in the laws were not then very forward to take it upon them." That usage shews, that the persons created serjeants, were persons supposed to be skilful in the law before they were made serjeants by the king, "insomuch as the kings of this realm became necessitated to require them thereunto by a special writ of summons. The first of which writs, (where-with I have met) was in the 6th of *Richard* the II. unto *John Cary*, *Edmund Clay*, and *John Hille*. Howbeit, after that time, several others had the like writs, but not at their own seeking, as it seems by this following instance of *John Martyn*, *William Babington*, and others, who declining to take upon them that degree and state, being called by writ in 3 *H. V.*, had a complaint made against them in the parliament of 5th of *H.* the Vth; whereupon they were compelled thereto, as by the roll of that year appeareth." That proceeding is set out in *Wynne's Tracts* (b). "*John Martin*, *William Pole*, *William Westbury*, *John Juyn*, and *Thomas Rolfe*, five grave and famous apprentices (c) of the law, having writs delivered to them to take the state and degree of serjeant, returnable in Michaelmas term, when all the means which they had used could not prevail, they, at the return in chancery, absolutely refused the same, had a complaint made against them in parliament; whereupon by advice of the lords spiritual and temporal, they were convened before the parliament, and they, appearing accordingly, were charged to take upon them the state and degree, under a great penalty. They prayed to be excused till Trinity term following, and promised they would then obey without further delay; which, at last, they did, and

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Masters in
Chancery.

Antiquity of
Serjeants' writs.

Refusal of five
apprentices to
become Ser-
jeants, corrected
in parliament.

(a) See Appendix, No. XVI. (b) p 252. (c) *Ante*, 7, 32.

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divers of them did afterwards worthily serve the kingdom in the principal offices of the law. But what was the reason or motive of their refusal, does not appear." [Lord *Brougham*. How were they compelled by parliament? Was there an act of parliament, in the nature of an act for pains and penalties? (a)] There was a complaint,—as it was the habit of that day to complain of any grievance then felt,—and the complaint was, that certain persons had refused to take upon them the degree of serjeant. [Lord *Brougham*. How did the parliament deal with it, did they make an order?] Yes; and that order was obeyed. The case mentioned by *Dugdale*, as occurring in 8 *Richard II.* "*de Joh. Cary exonerando 100l.*," is an instance of the discharge of a person who had been distrained upon, by the sheriff of Devon, for the penalty incurred by him for not taking upon him the degree of serjeant, in obedience to that writ, and which penalty the king had pardoned. The pardon recites the writ enjoining *Cary* to take upon him the degree of serjeant, without excuse, under the penalty of 100*l.*, and that the sheriff had levied the penalty of 100*l.*, and that *Cary* had applied to the crown to be exonerated from that fine, and that the crown had exonerated him. These authorities shew the antiquity of the office of serjeant, the mode in which it was created, and instances in which parties were compelled to take it. But there are other curious cases of the discharge of serjeants from the office, one of which occurred where a serjeant had been appointed solicitor general. In Serjeant *Shepherd's* case, the course taken by the crown was, to alter the precedence among its officers; but in this case, there is a discharge by the crown of the serjeant from the duties of the office. The first instance is that of Serjeant *Rokeby*, in *Dugdale* (b): *Philip and Mary*, "by the grace of God, &c. To Our trusty and well-beloved subject, *Rafe Rokebye*, serjeant at the law, greeting. Whereas, We of late, by Our letters-patent, bearing date at Westminster the 22d of June, in the first and second years of Our reign, have consti-

Serjeant Roke-
by's case.

(a) *Quære*, as to such a course in the reign of *Edward I.*

(b) *Origines*, cap. liv, p. 139.

tuted, ordained, and appointed you one of Our justices and commissioners in the north parts: know ye, that We, for and in consideration that ye should be the more able to give your ready attendance, in and about Our affairs, within the said north parts, and for divers other good causes and considerations Us moving, of Our especial grace and mere motion have acquitted, released, and discharged, and, by these presents, do acquit, release, and discharge you, of and from all attendance and service that ye should or ought to give or do at any time or times, or at any place or places, for or by reason of your being serjeant at law, or by reason of the said office, state, or degree of serjeant at law: And also, We release and discharge you, by these presents, of and for wearing any quayf, commonly called a serjeant's quayf (*a*), and of and for wearing all other apparel, garments, vestures, and habits, that, by the laws and customs of this Our realm, ye should or ought to wear or use for that ye be serjeant at law, except only in the presence of Our justices, at such time and places as they sit in judgment, or in any other place of judgment. And We, of Our further grace do also, by these presents, acquit, release, and discharge of and from being or calling of you to any office of any of Our justices or of any of Our benches, or of any circuit, and, generally, of and from all other things whatsoever that ye by any manner of means ought or are bounden to do, use, or exercise, by reason that ye be a serjeant at law, as clearly and freely, to all intents and purposes, as though ye had never been a serjeant at law, or had never taken upon you the office, state, or degree of serjeant at law, any statute, law, custom, or use had, made, or used to the contrary, notwithstanding. Witness, Ourselves, at Westminster, the 5th day of November, in the 37th year of Our reign." This writ is therefore under the great seal. In the same page we find (*b*) "A discharge of the state and degree of serjeant at the law, of *Thomas Fleming* (who was then made the queen's solicitor general). *Elizabeth*, &c. To Our trusty and well-beloved subject *Thomas Fleming*, serjeant at the law, greeting. Whereas

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Form of letters-
patent to dis-
charge a ser-
jeant.

Serjeant Flem-
ing's case.

(*a*) See Appendix, No. XVII.

(*b*) Dugd. Origin. 140.

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Discharge of
serjeant.

Fortescue's
description of
Serjeants.

Serjeants, how
chosen.

We were minded, and do intend, otherwise to employ you in Our service: know ye, that We, as well in consideration thereof, as for divers other good causes and considerations Us moving, of Our especial grace and mere motion, have acquitted, released, and discharged, and by these presents do acquit &c. you, of and from being any more from henceforth serjeant at law, and of the name, title, and degree of serjeant at law, and of and from all attendance and service that you should or ought to give or do, at any time or times, or at any place or places, for or by reason of your being a serjeant at law, or by reason of the said office, state, or degree;" with a release, in the same way (a), from wearing the coif, &c. [Dr. *Lushington*. That appears to be a *partial* (b) discharge.] That is so; and it is a discharge only from certain duties and offices. The other case (a) is, that of a supersedeas altogether of the degree. This office of serjeant at law, therefore, is an immemorial office in this country, spoken of in the oldest documents as an office then known. Certainly Lord *Coke* states that it was an office very far beyond legal memory. Then comes the question whether, during the time that the Court of Common Pleas has existed, any other persons have been allowed to have the privilege of audience there, except the serjeants,—whether that is not one of the immemorial privileges of that office, and a part of the immemorial usage of that Court. *Fortescue* says (c), " But, my prince, since you are so desirous to know, wherefore, in the laws of England, the degrees of bachelor and doctor are not conferred, as in the professions of the canon and civil law in our universities, I would give you to understand, that though in our inns of court there be no degrees which bear those titles, yet there is in them conferred a degree, or rather an honorary estate, no less celebrated and solemn than that of a doctor, which is called the degree of a serjeant at law. It is conferred in the following manner: the lord chief justice of the Common Pleas, by and with the advice and consent of all the judges, is wont to pitch upon, as often as he sees fitting, seven or eight of the discreeter persons, such as have made the greatest proficiency in the general study

(a) *Ante*, 36. (b) *Quære*. (c) *De Laudibus*, cap. 50, page 175.

of the laws, and whom they judge best qualified. The manner is, to deliver in their names, in writing, to the lord high chancellor in England, who, by virtue of the king's writ, shall forthwith command every one of the persons so pitched upon, that he be before the king, at a day certain, to take upon him the state and degree of a serjeant at law, under a great penalty in every one of the said writs specified and limited. At which day, the parties summoned and appearing, each of them shall be sworn upon the Holy Gospels, that he will be ready, at a further day and place to be appointed, to take upon him the state and degree of a serjeant at law, and that he shall at the same time give gold, as according to the custom of the realm has in such cases been used and accustomed to be done. How each is to behave and demean himself, the particulars of the ceremony and manner how these estates and degrees are to be conferred and received, I forbear to insert. There is a feast," and so on. "There is not, in any other kingdom or state, any particular degree conferred on the practisers of the law, as such, unless it be in the kingdom of England: neither does it happen that, in any other country, an advocate enriches himself so much by his practice, as a serjeant at law. No one, be he never so well read and practised in the law, can be made a judge in the Courts of King's Bench or the Common Pleas, which are the supreme ordinary courts of the kingdom, unless he be first called to be a serjeant at law. Neither is any one, beside a serjeant, permitted to plead in the Court of Common Pleas, where all real actions are pleaded. Wherefore, to this day, no one hath been advanced to the state and degree of a serjeant at law, till he hath been first a student and a barrister full sixteen years (a)." Then it is stated that the coif is to be worn, which a judge and serjeant is not to take off, though he be in the royal presence and talking with the king's majesty. *Fortescue* was chief justice to *Henry VI.*; and in the following reign, that of *Edward IV.*, a case was discussed in which the question was, whether, according to the privileges of serjeants, they were to be impleaded by bill or by writ original in the Court of Common Pleas; *Paston v.*

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Serjeants, how
created.

Pre-eminence
of Serjeants.

*Paston v.
Genney.*

(a) The original is, "qui non, in prædicto generali legis studio, 16 annos, ad minus, antea complevit." Barristers are not alluded to.

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Genney (a), in which the right of the serjeants to exclusive practice in the Common Pleas, was treated as an unquestionable and undoubted right. Sir *John Paston*, knight, sued a bill of debt upon an obligation, against *W. Genney*, serjeant at law, then being at the bar. *Genney* said that he appeared at the bar to plead and minister the matter of his clients at the bar, and he did not understand that he should be put to answer that bill; and it was debated, whether he should be put to answer, as a *minister*, or filacer, or attorney of the Place (b) should be (c). And afterwards *Genney* appeared to the bill, and said, that he was serjeant at law, and that he and all serjeants at law, from the time of which &c., have been impleaded by writ original and not by bill; and he prays judgment if on this bill the Court would hold plea. And the plaintiff said, that because the defendant appeared and said nothing in bar &c., he prayed judgment and his debt and damages. *Fairfax*, serjeant, said, "Sir, the plea is not good, for the prescription is void, inasmuch as the serjeants cannot prescribe, for they are not corporate &c.; and also they prescribe in the negative, to wit, that they have not been used to be impleaded by bill; whereas such prescription is bad; nor could we have traverse to this plea, to wit, if it has been used or not." *Catesby*, serjeant, on the contrary: "As to the first objection, that they are not corporate, and that therefore they cannot prescribe, Sir, attorneys and ministers of this place may prescribe to have the privilege of this place to be impleaded here; and yet they are not corporate, but they prescribe according to their custom, &c. And, Sir, as to that which is said, that a man cannot prescribe in the negative, I admit (d) that in a *mere* negative a man cannot prescribe; but in a negative pregnant, or in the affirmative, a man may prescribe; for it is a good plea to say, that all the inhabitants of Dale have used to pay but a penny for toll and not more." *Brian*, C.J. says this: "If the usage should be tried by our discretion, as we all agree,

(a) M. 11 *Edw.* IV. (1471), fo. 2, pl. 4.

(b) i. e. the Common Pleas.

(c) Here the reporter observes, "Sed non interfui."

(d) *Jeo voile*.

then the plea of prescription is but void; for although he had not alleged this, we ought to have adjudged it, *ex officio*; so in effect he said nothing but that he should be condemned for want of answer; and, Sir, it appears to me that he should be impleaded by bill; for a serjeant is a *minister* of the Court, without whom the Court would not be served or used (*a*). For no one ought to plead here for another but a serjeant; but an apprentice (*b*), and any other person, in his own matter, shall be received to plead elsewhere; so that, for the same reason, this bill lies against a serjeant at law, as well as against an attorney; for truly (*c*) their attendance is more necessary than is the attendance of the attorney; and, Sir, if a serjeant will not be of counsel here with a poor man (*d*) by our assignment, we cannot make him not a serjeant, for he has this name given by the king; but we can estrange him from the bar, so that he shall not be received to plead; and, Sir, there is a difference between *members* of the Court, and *ministers* of the Court, who are the officers and attorneys; for the members who practise (*e*) here of record, are impleadable here by bill, because they shall be required to do their offices, and if they make default they shall be forejudged of their offices; but a sheriff is a minister to receive writs and return them, and bill does not lie against him, for his employment (*f*) is in the country, to wit, in his county. So, an ordinary who comes to have a clerk delivered to him, he is a minister to the Court at this time, and no bill lies against him; and so there is a diversity between a minister and a member of the Court, &c., and because a serjeant is a member of the Court it seems that a bill lies against him." This case is cited to shew, that it was stated by the judges at that time, and acquiesced in by all parties, that the only persons who could plead in the Court of Common Pleas, were the serjeants

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Paston v. Gen-
ney, continued.

(*a*) "Occupie."

(*b*) *Ante*, 7, 11, 32, *post*, 45, 49.

(*c*) "Si."

(*d*) The first statute for suing and defending in formâ pauperis (11 Hen. VII. c. 12, intituled, "An Act to help and speed poor Persons in their Suits,") passed in 1495. It appears, however, from a case reported in 1475, that at common law, if a party would swear that he was unable to pay for entering his pleadings, the officer was bound to enter them gratis, and that in the Common Pleas there was a "presignator pur les poers." M. 15 Edw. IV. fo. 26, pl. 2.

(*e*) "Occupie."

(*f*) "Occupation."

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*Paston v. Gen-
ney, continued.*

at law. [Lord *Brougham*. But that the Court might, though they had a right to plead there, silence them if they chose.] For sufficient cause. That is a necessary authority existing in all Courts. Then it is stated, "A serjeant at law is not bound to attend upon this Court except at his will, for he is not sworn to attend upon this Court, as an attorney is, but he is sworn that he will not delay the people. But if he will not be of counsel by our assignment, we can estrange him from the bar as to any plea; and, sir, I have seen here where an apprentice took challenge to the jury, and gave evidence in default of the serjeant (a); and, Sir, if a man be bail for one, and will bring him at his day, he shall have the privilege of this place, and still no bill lies against him; so it is of a prisoner in this Court, and of a disseisin of an officer in this Court, or razing a record here, that shall be tried by the filacers and attorneys (b) who attend here." Then *Littleton J.* says, "If all the serjeants were dead, we could hear the apprentices plead here by necessity and in ease of the people." To which *Brian C. J.* answers, "Then, by you, no serjeants shall be made *for necessity*." This implies that serjeants must be made, and compelled to take the office. That is clearly a dissent from what had been stated by the other judge. Then Serjeant *Genney* says, "I have seen my Master *Cheine*, chief justice of the King's Bench (c), come into this Court, and require the serjeants to be of counsel in a plea that was before him; and if they would not, he would have forejudged them from pleading in the King's Bench," as I presume all courts would have the power of doing, if there were sufficient cause. *Littleton J.* says, "and well he might;" and then Serjeant *Genney* says, "The Statute of Westminster 1, cap. 30, wills, that if a countour or other, do deceit to the Court, he shall have imprisonment for one year, and shall not be heard any

(a) Unless the chief justice was speaking of a trial at bar, it may be inferred from this observation that it was at that time unusual for apprentices to practise at nisi prius; *vide ante*, 2, n.

(b) As to this mode of trial, see Appendix, No. XVIII.

(c) *Cheine* (Serjeant, 1411, Justice, K. B., 1416; *post*, 49 (f)), was appointed Chief Justice of the King's Bench 21 January, 1424-5, and held the office till 1439.

more in Court. And this statute is not intended of serjeants at law only, for if an *apprentice* be found in deceit of this Court (a), he shall have the same punishment; and, if an apprentice be in the King's Bench, and is not (i. e. refuses to be) of counsel by assignment, the justices can remove him from the bar." The distinction of law is, that we cannot remove a serjeant from being a serjeant, for he was created by the king's writ, but we can do this, if he misbehaves himself in the Court, we can prevent him from being heard in the Court, for that is a power necessarily existing in the Court. But it is otherwise in the Court of King's Bench. [Lord *Wynford*. There is a case in which a barrister has been suspended (b).] There is; but the distinction is drawn between serjeants, whose privileges are founded upon the King's writ, and barristers, who are persons who derive their authority from the Court. The Court says, that nothing will destroy a serjeant, once a serjeant. [Lord *Wynford*. I remember Lord *Eldon*'s saying that he never ceased to be of the degree of the coif (c). Lord *Brougham*. Barristers are not made by the judges, and a mandamus does not lie to the judges to admit a person to practise as a barrister.] The mode in which persons have been called to the bar does not very evidently appear. An appeal lies to the judges in case the benchers refuse. In *Wooller*'s case (d) the application was, not to be called to the bar, but to be admitted as a student; but there was an application in Lord *Mansfield*'s time (e), for a mandamus to compel the benchers of Lincoln's Inn to admit a person to the bar. The Court refused, in each case, to interfere. But the effect of the case of *Paston v. Genney* is this,—that no question or doubt was entertained by

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Paston v. Genney, concluded.

Calling to the
bar.

(a) *Ante*, 42 (a).

(b) And also disbarred, see *Booreman's case*, March, 177; *Savage's case*, 1 Dougl. 355, 356. And see *Style's Rep.* 42; *Townsend's case*, Sir T. Raym. 69.

(c) Neither the office of a judge or baron, nor that of commissioner of the great seal, nor a patent to be a peer of the realm, discharges from the degree of serjeant; *Com. Dig. title Ley* (D 3), citing 3 Levinz, 351.

(d) *Rex v. Benchers of Lincoln's Inn*, 4 Barnw. & Cressw. 855, and 7 Dowl. & Ryl. 351.

(e) *Rex v. Benchers of Gray's Inn*, on the prosecution of *William Hart*.

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Statute de attor-
natis et appren-
ticiis.

any body, that the serjeants had the exclusive right of audience in that Court. A doubt was thrown out whether, if all the serjeants died, barristers might practise there, or whether it would not be necessary then, to have recourse to what had been previously done (a), namely, to compel persons to take upon them the degree of the coif. But if there are serjeants, those serjeants have the exclusive right to practise in that Court, and they are therefore members of that Court. and part of the Court itself. Nothing can be more clear than the quotation from *Fortescue*, and the case from the Year Books (b), as shewing the immemorial right of the serjeants to exclusive audience in the Common Pleas. [Lord *Brougham*. In that Court only, real actions were tried, when (c) cases upon real property formed the great bulk of the cases tried; and those persons having the degree of the coif had alone the power of conducting them. The crown could, by the privilege you now claim for them, confine the bulk of the causes of the country to any two persons.] So might the benchers. If the prerogative of the crown were tried by the power of abuse, there is no part of it that could stand the test. The king may make peace or war to the injury of the country, and he may create peers to the injury of the country, he has the power to do it, and he may create justices (d) in such a way as would be prejudicial to the public, so he may refuse to create serjeants, or he may create serjeants, in the same way; but it is not to be supposed that any prerogative that the crown has hitherto exercised for the benefit of the public will be exercised in any other way. I will now refer to what, I understand, has been considered as tending to shew, that the serjeants have not an exclusive right of prac-

(a) In the case of *Martin and others*, ante, 35.

(b) *Paston v. Genney*, supra, 40.

(c) *Personal* actions, not involving a breach of the peace, could formerly be brought only in the Common Pleas, except where the parties were privileged as officers of another court, or as being in custody in such other court. It was the great civil court of the realm, as the King's Bench was the great criminal court, and the Exchequer, the court of revenue.

(d) According to *Roger North*, Charles II. made Sir Robert Wright a judge knowing him to be grossly ignorant and dishonest; *Life of Guilford*, vol. ii. p. 173.

tising in the Common Pleas, or as giving something in the shape of authority, for the interference of the crown with the proceedings of the Common Pleas, or other Courts of justice. It is from the Parliament Rolls of Edward I. and is headed "*De Attornatis et Apprenticiis*" (a). It was supposed, that this was an act by the crown; but whatever its effect may be, it is an act by the parliament,—it is in the parliament rolls, and under the authority of parliament (b).

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"*De attornatis et apprenticiis, dominus rex injunxit J. de Mettingham et sociis suis, quod ipsi, per eorum discretionem, provideant et ordinent certum numerum, de quolibet comitatu, de melioribus et dignioribus et libentius addiscentibus, secundum quod intellexerint quod curiæ suæ et populo de regno, melius valere poterit, et majus commodum fuerit.*"

Authority to
John de Met-
tingham.

Therefore Mettingham and others, at their discretion, were to provide a certain number of persons skilled in the law, such as they should think best for the good of the people and for the service of the court; it was an appointment of a certain number of persons to act as attorneys in the different counties, "*Et quod ipsi, quos ad hoc elegerint, curiam sequantur, et se de negotiis in eâdem curiâ intromittant, et alii non. Et videtur Regi, et ejus concilio, quod septies viginti sufficere poterint; apponant tamen præfati justiciarii, plures, si viderint esse faciendum, vel numerum anticipent. Et de aliis remanentibus, fiat, per discretionem eorundum justiciariorum, &c.*" The king in council suggests that a certain number may be sufficient, but leaves that to the discretion of the judges. From the history of what had been passing at this time, it is evident that this is a statutory power to the judges to admit attorneys to this Court, and that it cannot in any way apply to advocates in any courts, or above all, not to advocates in the Common Pleas, which was always sitting in Westminster alone (c). The judges of assize had been directed to make circuits in the different counties (d), and a statute (e) had been passed, just before, to allow suitors to appear in the different Courts by attorney. According to the antient

(a) 20 *Edw. I.* (1292), 1 *Rot. Parl.* 84. (b) See Appendix, No. XIX.

(c) *Ante*, 28, *sed vide* Appendix, No. IX.

(d) *Westm.* 2, c. 30; *Westm.* 3, c. 5.

(e) *Westm.* 2, c. 10.

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Breve de dedi-
mus potestatem
de attorney
faciendo.

Entry of ap-
pearance.

practice, parties were bound to appear in person in the courts, as they are now in all criminal matters; they were not allowed to appear by attorney (a). But though that was the general rule, a writ might be obtained, upon the payment of a fine, by which the party, in a particular case, was allowed to appear by attorney. Fitzherbert says, "It seemeth, that before the statutes which gave power unto a man to make an attorney, the justices would not suffer that the plaintiff or the defendant, or the demandant, or the tenant, should make attorney in any action, suit, or bill, in any court of record or in any court not of record; because the words of the writ command the defendant to appear, &c. and that was always taken to be in proper person. The form of entry in every action for the plaintiff or demandant is, Et præd: Quer: obtulit se 4^o die, &c. et prædict: Def: non venit; ideo præceptum est vic: quod, &c., by which it was taken, that the plaintiff was to appear in proper person; but now, by the statutes, he may make attorney in a court baron or other courts, and may make attorney for suit-personal at the hundred or other court baron; but for suit-real (b) at the leet, or at the sheriff's torn, he cannot do it by attorney, but he ought to do the same in proper person. But it seemeth, that the king by his prerogative, and before the statutes, might give warrant unto a man to make attorney in every action or suit, and that, as well unto the demandant or tenant as unto the plaintiff or defendant, and that he might direct his writs or letters unto the judges of courts, commanding them to admit and receive such persons by their attorney; and that the judges are bound to do the same. And, it seemeth, one cause is, because it shall not be error, if the judge admit any

(a) It was thought unreasonable that one man should be substituted (*atourné*) for another, whereby the attorney, as the substitute, would become punishable for the crime of his principal, *pro alieno delicto*. — *Hengham Magna*, c. 7, *de Atornatis*.

(b) The words "real" and "personal," when applied to suit have a very different meaning from the same words used in connexion with property or estate. Indeed the terms seem to be nearly reversed. Suit-personal, is that attendance which a man owes at the feudal court (whether the court baron, hundred court, or county court) in respect of tenure,—suit real, is that which he owes at the king's criminal court, whether at the private leet, (called simply the court leet) or at the public leet, (called the sheriff's torn,) in respect of residence.

plaintiff, or defendant, to make attorney in any suit or action in which, by the law, he ought "not to make attorney" (a). Therefore, according to the old common law, it was thus in civil actions, as well as criminal, the parties were bound to appear in person; but by usage, and the common law, the king had the right to allow attorneys to appear for them. By the antient common law, the parties were bound to appear in person unless they purchased a writ (b), for which they paid a fine; and that writ authorised them to appear by attorney in that particular case. But by 13 Edw. I. cap. 10, which recites the circuits of the judges, and shews the object for which it was enacted, and makes regulations as to the delivery of writs during the circuits of the judges, and then it states this, "Our lord the king, of his special grace, granteth, that such as have land in divers shires, where the justices make their circuit, or that fear to be impleaded of lands in shires where the justices make their circuit, and are impleaded of other lands in shires where the justices have no circuit, as before the justices at Westminster (c), or in the King's Bench (d), or before justices assigned to take assizes, or in any county (e) before sheriffs, or in any court baron, may make a general attorney to sue for them in all pleas in the circuit of justices, moved or to be moved, for them or against them, during the circuit, which attorney or attorneys shall have full power in all pleas moved during the circuit, until the plea be determined or that his master (f) remove him, yet shall they not be thereby excused, but they shall be put in juries and assizes, before the same justices." The 14 Edw. I. cap. 30, not printed at length in the statute book, directed the circuits to be held regularly. These alterations in the law, giving a general power to persons to appear by attorney, and directing circuits to be held regularly, are followed by the entry upon the parliament roll, by which the chief justice and the other judges are empowered to appoint a cer-

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Power given by
Westm. 2, c.
10, to appear by
attorney.

(a) F. N. B. 25 C.

(b) *Ante*, 46.

(c) i. e. the Common Pleas.

(d) This could only be at the suit of the king, or by writ of error, unless the words "impleaded of other lands" are to be understood, generally, of the title to lands being questioned in the course of a suit, as where title is pleaded in trespass, replevin, detinue, &c. And see Appendix, No. XX.

(e) i. e. County Court.

(f) Client.

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Entry of petition, that Judges and Serjeants might enrol attorneys.

Petition.

Royal Answer.

tain number, no doubt to admit certain persons to be attorneys of the Court; and it appears by the Parliament Rolls of 3 Hen. V. that a bill which did not receive the royal assent, was passed by the House of Commons, entered (a) as "A petition from the Commons, requesting that the judges and the serjeants may record attorneys in all courts." "Also beseech the Commons, that, whereas heretofore none of the king's justices of the one bench or the other, nor the chief baron of the Exchequer, had power to record attorneys except in the places in which themselves were justices or judges, except the chief justices of the one Bench and of the other; and in many counties of England none of the said justices or chief baron come there; and some who have been or are impleaded or impleading, were or are decrepit, some so old, some sick and detained with such infirmities, some occupied in the service of our sovereign lord the king, or otherwise, about such business, that they, for these causes and the like, cannot well come to the courts of our said lord the king,"—a recital shewing that the proposal applies to attorneys, because it is stated that the judges do not come into the counties to appoint, and that they are not able to go and transact the business there. "May it please our said sovereign lord to order, by the assent of the lords spiritual and temporal, in this present parliament, that each of the said justices and chief baron aforesaid, and each of the king's serjeants, have power to record attorneys in whatsoever place or court of our lord the king, as well in Chancery, King's Bench, Common Bench, and Exchequer, as in other places and courts of our lord the king; and that all the bills of attorneys by them or any of them (that is, by the judges or serjeants) taken or recorded in any place or court of our said lord the king, heretofore, be of record, and have force as well in pleas determined or pending, as in pleas which shall hereafter be commenced." The answer is, "Let it be as it has been used before in this case;" that is, make no new law. Nothing further has been found in the shape of authority to break down the exclusive practice of the serjeants in the Common Pleas, or to shew the interference of the crown. Another

(a) 3 Hen. V. (1415,) 4 Rot. Parl. 80.

statement is made in *Dugdale*, from which it has been supposed, that one who was not a serjeant, an apprentice (*a*), had audience in the Common Pleas, and the way in which it is stated in *Dugdale* might lead to that inference (*b*). He is speaking there of the meaning of the word "apprentice," and he says "of this name, to wit, apprentice, thus then attributed to the students of the law (but now taken for a double reader), there is mention long before, namely, in the Year Book of 1 *Edw.* III. where it is said, *et puis un apprentise demanda, &c.*, so likewise in the Year Book of 29 *Edw.* III. fo. 47 b, where, upon an exception taken at the bar by *Ingleby, Willy* and *Skypwith* answered, that that was never an exception taken in that place, but they had heard it oft times *entre les apprentices, en hostells* (*c*), by which instance it should seem, that the word apprentice doth signifie a pleader only; as it doth also (I think) in 2 *Hen.* VI., where it is said, an apprentice comes down into the common bench, which is somewhat observable, because none now but serjeants at the law do come to that bar, unless that expression were then equivocal with serjeant, as perhaps it was, for I find that *Walter Ashham*, who was made (*d*) a serjeant at law in 12 *Henry* IV. had the title of apprentice attributed to him in 4 *Henry* 5, upon the demise of Serjeants' Inn in Chancery Lane, at that time. The words of my authority are these: An. 1416, pro Faryndon's Inne, Chanceler Lane, *dimissio Rogero Horton* (*e*) et *Will. Cheney* (*f*), *justiciariis, et Waltero Ashham, apprenticio legis, ad 6l. 13s. 4d.* But if the word apprentice had that acception then, it had not at some time before." By reference to that Year Book (*g*) it appears, not that any apprentice or barrister ever discussed or argued any question of law in the Common Pleas, but that an apprentice came from another Court to ask the opinion of the Common Pleas upon a point of law; and the Common Pleas then consulted (as was the habit of that time,) the serjeants at the bar, and there was an argument upon the point; but no barrister or

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Apprentices
sent from Ex-
chequer to
Common Pleas,
to ask opinion
of Justices and
Serjeants.

Supposed am-
biguity of term
"apprentice."

Demise of Ser-
jeants' Inn by
name of Faryn-
don's Inn.

Dugdale's mis-
take explained.

(*a*) Appendix, No. I. XIII.

(*b*) *Dugd. Orig.* 143.

(*c*) *i. e.* at mootings in Inns of Court.

(*d*) See Appendix No. XXI.

(*e*) Justice C. P. 1416.

(*f*) *W. Cheyne*, Serjeant 1416, Justice K. B. 1416, *ante*, 42 n.

(*g*) M. 2 H. 6, fo. 5, pl. 3.

Sir W. W. Follett. apprentice took any part in the discussion. The barrister, or apprentice (a), as he was called, came from the Exchequer, in which a suit was then pending, and asked the Common Pleas their opinion upon a point of law which would arise in that suit, "An apprentice comes into the Common Pleas, and shews to the justices how an abbot had brought a writ of debt by the name of *W. (b)*, abbot of *M.*, against *J. B.*; that process continued until the said *J. B.* had purchased charter of pardon (c); and on that had sued scire facias to warn the said abbot, and that the sheriff had returned on the scire facias, that a long time before the writ came to him, this *W.*, abbot, at whose suit the other was outlawed, was deposed, and another (d) elected, and still is abbot, wherefore he could not warn him by the name of abbot, according to the writ; and when the apprentice had shewn the case, he asked of the justices, if the charter of the defendant on such a return should be allowed, or the sheriff should be amerced; and the opinion of the justices was, that the charter should be allowed. And on that *Martin (e)*, one of the justices, *shewed the case to the serjeants at the bar*, and asked what seemed to them should be done in the case. *Hals, Serjt.*,—Sir, It seems to me that the sheriff shall be amerced. For supposing a writ of debt to be brought by a man and his wife, and process continued until the defendant be outlawed, afterwards the defendant purchases his charter of pardon, and sues a scire facias against the baron and his wife, and the sheriff returns, that long time before the writ came to him, divorce had been made between the baron and his wife, and so he could not warn them as such a one, and such a one his wife. I say, that on such a return, the sheriff should be amerced;" and then the judges answer that; and then they say afterwards, by the advice of all the justices, the charter was allowed. The very next case in the Year Book is one decided in the Exchequer in the very next term. It is a cause between *D'Arcy* and *The Abbot of Rowham*, wherein the very point upon which the Com-

Supposed case for opinion of Justices and Serjeants.

Opinion of Justices.

Opinion of Serjeants.

Real case in Exchequer of *D'Arcy v. Abbot of Rowham*.

(a) Appendix, No. I. XIII.

(b) Called "John," in *D'Arcy v. Abbot of Rowham*, H. 2 H. 6, fo. 5, pl. 1, the real case.

(c) i. e. a pardon of the outlawry which he had incurred in the action.

(d) "Robert," in the real case.

(e) *Ante*, 35.

mon Pleas had been consulted, arose; so that what *Dugdale* states as puzzling to him, of an apprentice being allowed to have audience in the Common Pleas, was nothing more than one Court asking the opinion of another, a course frequently adopted by other Courts, of inferior jurisdiction. They ask the opinion of other Courts upon points of law which arise before them; and the practice which now prevails, of the Courts of Equity sending to the Courts of Law, cases for their opinion, is a remnant of that practice. They are in the habit constantly of doing that, in the inferior Courts, and it is a common practice in all Courts, except that the King's Bench, Common Pleas, and Exchequer are not in the habit of doing it with each other. [*Tindal*, C. J. It is common for a judge at the assizes to send to the other judge one of the officers of the Court, stating that such a point had arisen, and asking his opinion upon it (a). Lord *Brougham*. But this case seems to have been *stated* by counsel.] A case is pending in the Exchequer, and they send to the Common Pleas to ask the opinion of that Court upon a certain point. They say, *supposing* a sheriff to return so and so, and such a fact to exist, what is the opinion of the Court upon such a state of facts? and then the judges having stated *their* opinion, submit the question to the serjeants at the bar, to be discussed. It is discussed by the serjeants, but no part is taken by the barrister; and then the answer is sent by the Common Pleas to the Exchequer, and, in giving the judgment, the Exchequer use an expression which is important to shew that it is the same case. "June (b), C. B. It appears to me, that the plaintiff shall have execution for the default of *John* (c), and that *Robert* shall not be received to plead, inasmuch as, *as it has been well said*, he is a stranger to the writ, and has no day by the return of the sheriff, in which case it would be against our law to receive him to

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Practice of
sending from
one court to
learn opinion of
other court.

Judgment of
Chief Baron in
D'Arcy v. Abbot of Rowham.

(a) It was formerly usual for the court of quarter sessions to take the opinion of the justices of assize; *Re v. Reading*, ca. temp. Hardwicke, 79. This practice has now given way to the more solemn, but not more inexpensive, course, of granting a special case for the opinion of the Court of King's Bench.

(b) The name of this learned judge, which occurs so frequently in the Year Books of Henry VI., is generally written, "Juyn;" sometimes "Ivyn."

(c) In the *supposed* case called "W."

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plead if he had not had a day by the return &c., or by roll; and I say, that notwithstanding that he be not received to plead, still he is at no mischief; for if *Robert* was abbot at the time the writ was purchased, and it was *John* who was warned, and the plaintiff, for the default of *John*, is adjudged to recover, and he sues execution of the goods of *Robert* the abbot, the said abbot shall well have a writ of trespass against the plaintiff, and there it would come in debate *who* was abbot at the time of the writ being brought; and I have communicated with the other judges of one bench and the other, and their opinion is in the same manner."

This doubt, which is stated in *Dugdale* (a), of apprentices being allowed to have audience in the Common Pleas, is thus satisfactorily explained. It is impossible that any evidence can be stronger of the exclusive right of audience of the serjeants in that Court (b). These authorities establish, first, the immemorial existence of the Court; secondly, the immemorial existence of the exclusive privileges of the serjeants in that Court. There is another case, which will shew that the office of serjeant, in the Common Pleas, is held by prescription, and that the right to appoint them is a prescriptive right. In *Skrogges v. Colsehill* (c), the office of exigenter (d) of London and other counties, became vacant by the death of *Hennings*, and afterwards Sir *Robert Brooke*, chief justice of the Common Bench, died; and during the vacancy of both the offices, Queen *Mary* granted the office of exigenter to one *Colsehill*, by her letters patent, and afterwards, by letters patent of the same date, granted the office of chief justice to *Anthony Browne*, who was admitted judge, and sworn on the first day of Michaelmas term, and refused *Colsehill*, and admitted to it *Skrogges*, his nephew. And now, in this term, there was a great contention between them for the office; and our lady the now queen commanded *Nicholas Bacon*, knight, keeper of the great seal, to examine the right and title of *Colsehill*, and to make report thereof to the queen; which keeper, after the end of this term, having convened all the judges of the King's Bench, *Catlyn*, *Whiddon*, *Rastal*, and *Corbet*, and *Sanders*, chief baron, and *Gerrard*, attor-

Grant of office
of exigenter

*Skrogges v.
Colsehill.*

(a) *Ante*, 49.

(c) *Dyer*, 175.

(b) See Appendix, No. XXII.

(d) *Com. Dig. tit. Courts*, (C. 4).

ney-general, and also *J. Caril*, attorney of the duchy, (all the judges of the Common Pleas being excluded,) took a clear resolution, after a long debate and hesitation, of all the premises, that the title of *Colsehill* was null, and that the gift of the office by no means and at no time belongs, or can belong, to our lady the queen, but is only in the disposal of the chief justice for the time being, as an inseparable incident, belonging to the person of the said chief, and this by reason of prescription and usage. And it follows from this, that our lady the queen herself cannot be chief justice in the said Bench. Notwithstanding the said resolution of the judges, the queen, upon importunate suit, directed her commission to the Earl of *Bedford*. The queen did not at all acquiesce in this decision of the judges, and she attempted to exercise her prerogative. The judges pronounced their opinion; the queen was not satisfied, and "she directed her commission to the said Earl of *Bedford*, and nine others, of whom were *Corbet*, J., *Whiddon* J., *Sir Roger Cholmeley*, *Sir W. Cordell*, master of the rolls, and *Richard Goodricke*, giving them full authority to hear and determine the interest and title of the office, between the parties, and to place *Colsehill* in the office of &c., and that if *Skrogges* refused to answer before them, they should immediately commit him to prison."

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*Skrogges v.
Colsehill* continued.

That is a very strong exercise of the prerogative; but if the warrant in question be considered right, this exercise of prerogative by Queen *Elizabeth* would not be wrong. If the crown has a right to direct writs to the chancellor or judges, interfering with the practice of serjeants, who are members of that Court, the crown may insist that such a person shall not be the exigenter, but that other persons shall execute the duties of that office, and that all the justices shall obey that warrant. The answer is, these rights depend upon common law, usage, and prescription, and the king has no right to interfere with them, and therefore the king cannot interfere with the usage of the Court, if such interference be contrary to the usage, nor can he interfere with the right of the serjeants, if that right be according to the usage and the common law. But Queen *Elizabeth* issues this commission with very extraordinary powers, directing that the man shall be committed to

Extent of prerogative as to interference with rights depending upon common law.

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*Skrogges v.
Colsehill* con-
cluded.

prison if he refuse to obey; and afterwards, in Michaelmas term following, *Colsehill* exhibited a bill of complaint to the commissioners against *Skrogges*, containing all his title as above, and that he was disseised and deforced of it by *Skrogges*; and *Skrogges* came, and demurred upon the bill and jurisdiction of the Court by the commission, and would not make other answer; and for this contempt he was by them committed to the prison of the Fleet, and there remained for two weeks, and then request was made by three serjeants in the Bench, to grant a *corpus cum causâ*, directed to the warden of the Fleet; and upon good consideration of the Court, (*Jas. Dyer (a)*, *A. Brown* and *R. Weston*,) the request was held reasonable and to be granted, because he was a person in the Court, and a necessary member of it; but what the form of the writ in this case should be, the Court would consider; and divers precedents thereof were vouched; and note the words of the statute of Westm. 2, cap. 30, for the origin of clerks of assize, "all justices of the benches from henceforth shall have in their circuits, clerks, to inrol all pleas pleaded before them, like as they have used to have in time past, and so it seems in reason, that the justices were before the clerks, and made clerks at their pleasure." Therefore the effect was, that the judges set aside at once this illegal exercise of prerogative, by which a party was put into prison, and relieved the party from confinement; but there is this decision of the Court, —and this is important, because it is the decision of the judges, with the exception of the judges of the Common Pleas, that the chief justice has the right to appoint the exigenter, by prescription and usage; that, therefore, is a distinct authority, that the offices and practice of that Court exist by usage, and cannot be interfered with; and I call upon those who are to argue on the other side of the bar (*b*), to distinguish that exercise of prerogative from one which says you shall allow others to have audience. The case of the *Duchess of Grafton v. Holt (c)*, which was an assize for the office of chief clerk, brought against the

(a) Sir James Dyer, J. the Reporter.

(b) The attorney and solicitor-general were at the sitting of the Court, called within the bar, to assist the Lords of the Council. They sat at a little table above or beyond the Lords.

(c) Skinner, 354

chief justice's brother, who succeeded,—turned upon the same point as the case in *Dyer* (a), namely, that the right to appear to the office was, by prescription and usage, solely in the chief justice. This shews that the office may exist by prescription and usage in that Court. [Lord *Brougham*. Here, there is no profit annexed to the thing, in contemplation of law.] According to the present practice: but from the old entries (b) it would appear, that serjeants might have maintained actions for their fees. In the *Mirror* it is stated (c) that the serjeants are entitled to receive salary. But it is not necessary to say that serjeants are entitled to fees; if there are privileges or rights attached to the rank, it is the same thing, and the crown can no more interfere, than in the case of pecuniary rewards. If a person is entitled to exercise an office of honour, and has an immemorial right to that office, the crown can no more interfere, than in the case of an office to which a salary is attached. [Vaughan J. referred to a case in *Bulstrode* (d) where the serjeants claimed precedence of the attorney and solicitor general, except where they were upon the king's business.] The attorney general's claim has grown up by degrees, so that he now takes precedence, not only of the ordinary serjeants, but of the king's serjeants (e); but the serjeants were in former times entitled to take precedence of the attorney and solicitor general, if the attorney and solicitor general appeared to plead the cause of an ordinary client; if they appeared to plead the cause of the crown, then, out of respect to the crown, they were entitled to take precedence. The case in the King's Bench, reported by *Bulstrode*, concludes as follows—Note. "That Sir *Francis Bacon*, attorney, being to move, a serjeant at law" not a king's serjeant, but a serjeant, "having a short motion, offered to move before him, at which he was much moved, saying, that he marvelled he would offer this to him. Upon this *Coke*, Chief Justice,—No serjeant ought to move before the king's attorney, when he moves for the king, but for other motions any serjeant at law is to move before him, and when I was the king's attorney, I never offered to move before a serjeant, unless it was for the king."

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Serjeants' fees.

Question of precedence between attorney general and serjeants at law.

(a) *Ante*, 53, 54.

(b) *Vide post*,

(c) *Ante*, 32, 32.

(d) 3 *Bulstr.* 32, in the case of *Brownlow v. Cor.*

(e) *Ante* 6 n, 19.

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Usages of
courts.

Creation of
courts and regu-
lation of prac-
tice.

Not only from this, but from other passages respecting precedence, the serjeants appear to have been always known and recognized as a body having precedence, in antient times, in that Court. The authority of officers derived from usage, formed a subject of discussion in the Court, with reference to the right of the solicitor general to file an information, in the case of the *King v. Wilks (a)*. The decision was in favour of the right, upon the ground that it had been the usage and practice of the Court, during the vacancy of the office of attorney general. Lord *Mansfield* says, the usage and practice of the courts make the law, that by the usage and practice of the Court it had been done, and therefore he held it to be legally done. If the usage and practice of the Court make the law in one respect, they make it in another; and the usage and practice of the Court having, in all times, confined the right of audience to the serjeants, it seems to be as great an interference on the part of the crown with the law of that Court, to say that the serjeants are not to exercise it, as if the crown exercised any interference with respect to the form of the writs, or any other matter that the crown might think to be for the benefit of the public. The crown may create courts, but when created, the crown has no power to destroy them, or to interfere with their proceedings. The judges may alter the practice of the court in certain cases. Some parts of the practice the judges cannot alter, some they can. But although the judges may do it, and establish the usage and practice of the court, the king cannot; and when that court has proceeded according to the practice laid down by the preceding judges, the authority of the crown would cease altogether; and therefore, if a court be created, it must proceed according to the practice of the common law. The crown could not create another court of equity (*b*). It may create another court to proceed according to the rules of the common law, but not to proceed against them; and then there may be a power, necessarily incident, in the judges, to decide upon the proceedings and practice of that court; but the king never could interfere with any rule laid down by the judges, or direct them to alter that course

(*a*) 4 Burr. 2555, 2572. And see 2 Merivale, 458. (*b*) 13 Co. Rep. 32.

of practice. With respect to hearing persons in courts that have been formed, the courts may probably have the power of laying down the rule that they will hear attorneys, or that they will hear only barristers; but after the king has created a court, and the judges have laid down a rule that they would hear only barristers or attorneys, the king can not send a letter to the judges of that court to say, "We command you to hear, not only barristers, but all other persons." The whole power of the crown has ceased, after the court has been created; the crown cannot interfere with it, after it has been formed. The authority of the crown is thus stated in Bacon's Abridgement (*a*). After stating that, in former times, the king himself was in the habit of administering justice, it is said, "but however this regulation might have been begun, or however it might have been formerly, as to the king's sitting and determining in causes, it seems now agreed, that our kings have delegated their whole judicial power to the judges of their several courts. They, by the long, constant, and uninterrupted usage of many ages, have now gained a known and stated jurisdiction, regulated by certain and established rules, which our kings themselves cannot make any alteration in, without an act of parliament; but as the king is the fountain of justice, and the supreme magistrate of the kingdom, entrusted with the whole executive power of the law, no court whatsoever can claim any jurisdiction, unless it, some way or other, derive it from the crown; but it is clearly agreed that the king cannot give any addition of jurisdiction to an antient court, but that all such courts must be holden in such manner, and proceed by such rules, and in such cases only, as their known usage has limited and prescribed; and hence it followeth, that the Court of King's Bench cannot be authorized to determine a mere real action between subject and subject, so neither can the Court of Common Pleas inquire of treason or felony." The jealousy of the people, of the interference of the king with the courts of common law, is shewn by 4 *Edward I.*, and several antient statutes (*b*) in different reigns, enacting

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Power of the
King to sit in
court in person.

Judicial power
of the crown
delegated to
Judges.

Distinct juris-
diction of parti-
cular courts.

(*a*) *Bac. Abr. Courts.* And see *Com. Dig. Courts*, (C 2).

(*b*) 18 *Edw. III.* stat. 4; 20 *Edw. III.* cap. 1; 11 *Richard II.* c. 10. See Appendix No. XXIII. a letter under the Privy Seal, 8 *Edw. III.*

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Judges not to
regard letters
from the King.

Serjeant's hand
to pleas.

that the judges should proceed and decide the cases before them, according to the practice of the court, notwithstanding any letter or interference of the crown, and that no letter from the crown, either under the sign manual or the seal, is to have any effect in altering the proceedings of the courts, or in preventing the judges from administering justice in their courts. The object of these statutes, no doubt, was to prevent the interference of the crown in obstructing the course of justice in any particular case which might be before the court; but they shew the jealousy, existing at that time, of the interference of the crown with the regular course of the proceedings of the courts. Letters of the signet or of the king's privy seal, are not from thenceforth to be sent in damage or prejudice of the realm, or in disturbance of the law (a). But though these statutes may have been passed for the purpose of preventing the interference of the crown with the courts of justice in particular cases, they apply also to the interference of the crown in disturbance of the law, in any case. The crown has no more right to exercise a legislative power, altering, as this letter or warrant attempts to do, the whole course of practice in this Court, than it has to interfere with a court in one particular case. Whether the alteration be expedient or not, no right to make a legislative enactment, to affect, for the future, the course of proceeding of that court, is vested in the crown. Though there has been no discussion in the Common Pleas on the legality of the warrant, a question arose in that Court (b), as to the necessity of serjeants' signing the pleas. The antient practice of the Court, had required that the serjeants should sign the pleas. There is a case upon it as far back as 31 Geo. II. *Simpson v. Neale* (c). "Case on several promises in assumpsit. The defendant pleads a recovery, in King's Bench, for the same demands. Plaintiff replies, nul tiel record, without a serjeant's hand. Rule to shew cause, why the replication should not be set aside for want of a serjeant's hand to it. On shewing cause, it was in-

(a) 18 Edw. III. stat. 4; 20 Edw. III. cap. 1; 11 Richard II. cap. 10.

(b) *Power v. Isod*, ante, 15, post, 58.

(c) 2 Wilson, 74.

sisted by *Prince* and *Davey*, serjeants, for the plaintiff, that the rule ought to be discharged, and they cited *Upton v. Pullyn* (a), where it is stated by the reporter, that, amongst others, the plea of nul tiel record needs not a serjeant's hand. It was answered for the defendant, that all pleas, except the general issue, ought to be signed by a serjeant, and that it appears by the Year Books, for ages successively, that this plea of nul tiel record was always pleaded by a serjeant at the bar; and 19 *Hen. VI.*, fo. 79 b, 80 a, was cited, with many other cases from the Year Books; and it was said that the case cited out of *Cooke's* book is not agreeable to the rule pronounced by the Court in *Upton v. Pullyn*, but the catalogue of pleas inserted there by Sir *George Cooke* seems to be intended to draw practisers into the Common Pleas. But what was chiefly insisted upon was, that as the plea of a recovery in the King's Bench in this case was pleaded and signed by a serjeant, the same ought to be replied to or answered by a serjeant, propter dignitatem, for that no attorney or apprentice can answer a serjeant, or plead any plea in the Court of Common Pleas, and of that opinion was the Court, viz. *Clive*, *Bathurst* and *Noel*, justices, absente chief justice, who was in the Court of Chancery this day, June 15, 1757; and the rule was made absolute for setting aside the replication of nul tiel record, for want of a serjeant's hand." It having been the settled practice of that Court, that those pleas should be signed by serjeants, a question occurred in 1834, after this warrant, *Power v. Izod* (b), in which it was objected, that the plea was not signed by a serjeant, and that, although the bar at large was now admitted to practise in the Common Pleas, nothing had been done to alter the rule which required a serjeant's signature to a plea. *Tindal*, C. J. says, "The order, by which the bar in general are admitted to practise in the Common Pleas, is without qualification, and enables them to discharge there every duty of an advocate." [*Bosanquet* J. The order expressly mentions pleading.] Therefore if this order be binding upon the judges of the Common Pleas, it not only

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Simpson v. Neale
continued.

(a) Sir Geo. Cooke's Cases of Practice, 41.

(b) 1 Bingham N. C. 304; S. C. 1 Scott, 119; ante, 15.

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compels them to admit barristers to practise in that Court, and to alter the established practice in that respect, but it compels them to alter the rules and practice of the Court in other respects; because it compels them to alter the rule and practice in that point which, according to the case in *Wilson (a)*, had existed for centuries, namely, of requiring the signature of serjeants to pleas in that Court. Trying it by that test, it will hardly be contended, that the crown had a right to issue this warrant, if it had no right to exercise its prerogative in a *less* degree. According to the practice for centuries, it has been the custom to have the pleas signed by serjeants. Suppose the king were to send to the judges of that Court a letter, saying "It has been represented that the public good would be promoted if you did not require a serjeant to sign the pleas, and therefore We order you to receive them without their signature," would that be an illegal exercise of prerogative? Nobody can doubt it. Supposing the crown had said, We think it would be quite sufficient if they were signed by the attorney or attorney's clerk, nobody would contend that the crown could do so. And yet the effect of this order is, that that rule shall be altogether abolished. You shall not require the serjeant's signature, the signature of any other person shall be sufficient. If the consequence be, as the Common Pleas have said, not only that the judges must hear those barristers, but alter the whole practice of that Court, what is it but to say, that the king may by his prerogative send to them an order to alter its practice in any respect whatever. Upon that ground alone, this exercise of prerogative would be invalid; because if the crown can do it here, why can it not do it in a particular case? Why should it not say, "You require certain pleadings in your Court to be signed by counsel; it has been represented to Us that this is an injurious practice; and therefore We order you to receive pleas signed by any body?" The lord chancellor or any of the judges would say, that that is an illegal order—and an order which goes to other things, but embraces that, cannot be

(a) *Simpson v. Neale*, 2 Wils. 74.

legal. [Lord *Brougham*. Do you represent serjeants *Lawes, D'Oyly, Peake*, and the others?] I represent the petitioners only. [Lord *Brougham*. You do not make any tender on their behalf, as to relinquishing any right that they have obtained.] I have nothing to say upon that subject. [Lord *Brougham*. Because supposing the exclusive privilege were restored, we should be in this peculiar situation, that those learned serjeants who have obtained rank over all other king's counsel, would continue to rank next after Mr. *Balguay*, and also continue to have an exclusive privilege of audience in the Common Pleas, so that they would get a *douceur* (a).] As far as the Court of Common Pleas goes, they would have the same privileges as they had before; but that is not the question now submitted to the Court, which is simply, whether the warrant was a legitimate exercise of the prerogative of the crown at the time, so far as it affected the Court of Common Pleas. Besides, the point as to the signing of the pleas, we might try that by any of the other rules of practice which have been laid down and adopted in the Courts. The practice of the King's Bench in criminal matters, in some cases, is regulated by statute, but the greater part is not. Supposing that Court to have laid down certain rules as to the time of pleading, of parties appearing, and the time of trial, could a letter be sent stating that the king thought it a bad rule to allow a certain number of days notice of trial, and requiring the Court to alter it? It must be done by legislative enactment. Could it be said that the King could send a letter to the chief justice or any judges on the circuit, to say that he thought it more expedient that the party should appear by attorney? No one could contend that that was legal; and yet it does not differ from this. The crown has no right to interfere in any way, either in small matters or in great, with the proceedings of the Courts. [*Vaughan, J.* Suppose the crown, before the late act, had made an order, that all prisoners might make a full defence by counsel.] That

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Suggested that the warrant may be valid to confer precedence even if void as to opening court.

Right of crown to interfere with the number of days in a notice of trial.

(a) Here would be no *douceur* if the precedence conferred by the warrant were void, as not being granted by letters-patent, or if it ceased upon the demise of the crown, a fortiori, supposing the warrant to be waste paper, and the exclusive right of audience to continue.

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Follett.

Acquiescence of
Common Pleas
in warrant of
1834.

would be a similar case, an altering of the practice of the Court. It might be that the Court would have power to make a great many of those alterations. But can it be said that a letter from the crown to one of the judges, directing him to hear prisoners by counsel, would have been legal? Whether the Common Pleas could have made an order opening the Court is a different question, and rests upon other considerations. Should that question arise, it may require grave consideration of authorities of different sorts. That is not the question we are now discussing, because the Common Pleas have not assumed to do that—they have acted in obedience to the order of the crown. The judges of the Common Pleas say, it is not that we think it right to make this alteration, but it is the order of the crown we are obeying, and that introduces the alteration into the practice of the Court. [Lord *Brougham*. If the crown had no power to make such an order, it was not imperative upon the Court. The judges of the Common Pleas might have said, we will not obey Your Majesty's letter. But they have not done it.] There might be many reasons to induce them not to take that course; but when it becomes important to decide upon the legality of such a letter, the most respectful course is, to present a petition to the crown. [Lord *Wynford*. Any serjeant might have got up and objected to any other than a serjeant being heard, and then the judges must have decided on the legality of the order. *Tindal*, C. J. That was never done. *Bosanquet*, J. The order was read by the direction of the Court. *Vaughan*, J. Does not that raise the question, whether it became theirs by adoption? Lord *Brougham*. In the case cited from 10 *Edw.* IV. (a) the Court say, "though no one had taken notice of the privilege of the serjeants, we ought to have taken notice of it ourselves." So that the Court have in this case for four years and a half acquiesced in the order, and have not taken notice of the privileges of the serjeants. Nor did the serjeants make the objection at the time when, as Lord *Wynford* says, any serjeant might have taken the objection.] There was no opportunity of consultation among

(a) *Paston v. Genney*, M. 11 *Edw.* IV. fo. 2, pl. 4.

the serjeants with respect to it. Nothing of that sort was done by the serjeants or the judges, but notwithstanding the silence of the bar or of the judges, the question as to the legality of the order remains. Several cases analogous to that of full defence by counsel in cases of felony might be put. [Lord *Denman*. Would the crown have power to direct in a case of misdemeanor that counsel should not be heard? That is a matter of practice. Doctor *Lushington*. Suppose the Court had been attended by the barristers, could the crown say, that it should be attended by serjeants only?] That question was put in a former part of the argument. Could the crown direct the House of Lords or the King's Bench to give exclusive audience to serjeants? If the crown were to say, in the recital in a warrant to the lord chancellor, that the public benefit would be consulted and the business would be better transacted in the House of Lords if persons particularly well skilled in the law were to attend there, and therefore you shall admit none but the serjeants; or sup-
 posing the crown should order that none but the doctors of civil law should be admitted to practise. [Lord *Wynford*. That came under the consideration of the commission on criminal law (a), whether some alteration could be made of the practice of Doctors' Commons, but it was thought that it must be done by act of parliament.] The exclusive right of practising in the Courts at Doctors' Commons by persons who have taken the degree of doctors of law, appears to be a right, not created by statute, but resting on immemorial practice. That is a case in point, except that the privileges of the serjeants were better established and better recognized, and therefore presented a very much stronger case. But could the crown tomorrow issue an order to a member of the judicial committee of the privy council commanding him not to give exclusive audience to doctors of the civil law (b), but to allow all the barristers of Westminster Hall to practise there? If it could be

Sir W. W.
 Follett.

Doctors of Law.

(a) Quære. Such a point does not appear to be adverted to in the reports of the commissioners, or to come within the objects of the commission.

(b) That is, in cases transferred to the privy council from the Ecclesiastical and Admiralty Courts by 2 & 3 Will. IV. c. 92, and 3 & 4 Will. IV. c. 41.

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Follett.

Privileges of
Proctors.

Common
Pleaders of city
of London.

done in the case of the Common Pleas, *à fortiori* might it be done there; because the authority of the serjeant is a recognized authority as far back as you can go; the authority of doctors does not rest upon an equal foundation; but in either case it is submitted, that the crown could not interfere with the practice of the Court, and that the Court would not be bound to obey an order constituting such an illegal stretch of prerogative. The question has lately been raised here respecting the exclusive right of proctors. There is no statute giving such right; but there was an act of parliament by which it was provided, that, when the jurisdiction of the Admiralty Courts was transferred to the privy council, the same persons who had had the exclusive right of practising in those Courts should practise here; and the exclusive right of proctors to practise in those Courts was recognized here, and this Court would not allow an appeal to be conducted under the statute by an attorney, because proctors had the exclusive right. [Lord Brougham. We held that to be quite clear, *de facto*.] Supposing, *de facto*, the proctors had exercised that right, by practice immemorial, and not by any statutory enactment, could the crown have issued an order to one of the judges of that Court to allow attorneys to practise in it? The crown may say, it is a grievance upon the subject to confine the jurisdiction to a particular class of persons; why should the suitor not be at liberty to choose his own persons. And, for ought I know, the suitors would not complain of such an alteration, but still I say it would, on the part of the crown, be an illegal exercise of the prerogative. The crown could not legally make the order at all, and the judges would not be bound to obey it. There are other Courts where the practice is confined—certain pleaders are appointed by the common council of the city of London restricted in number (*a*). The bar at large is not allowed to practise in the Court, but the practice is confined to certain persons. It may be said it would be very beneficial if, instead of having four barristers, the whole bar of England should be admitted. But could the king, by his prerogative, direct it to be done? In the

(*a*) See Appendix XXII.

Palace Court any barrister may go special, and plead the cause; but in ordinary cases the practice is confined to four barristers. Suppose the crown to alter that practice, would not such alteration be an interference with the established practice and usage of the court? [Lord *Brougham*.

*Sir W. W.
Follett.*

I was not aware that in those city courts there was any exclusive privilege.] Four counsel only are appointed, others may go in special. The court will hear a foreigner, with the consent of the counsel of the court, and the latter will not consent unless every one of them be employed—every one: and then no objection is made to a foreigner. If no suitor can have the benefit of a particular counsel in that court, without employing counsel whom he does not wish to employ, that might be considered by the Crown as a grievance upon the suitors. I refer to those courts, merely as an illustration of our mode of trying the question, whether the king would have the power, by his own prerogative, to interfere with the practice of that Court.

Common Pleas-
ders.

[Lord *Brougham*. The crown has no power to interfere with any corporation court—the crown cannot remove or appoint a corporation justice (*a*).] Still some of these Courts exist by prescription. Some of them are prescriptive Courts, the origin of which is unknown. [Lord *Brougham*. In which the crown has no power.] The counsel are appointed by the corporation. In the Palace Court it is not so—that is a direct emanation from the Crown; but even there, the Crown could not interfere with it after it is created. The only question submitted to the Court is, that this warrant is an illegal exercise of the prerogative—that is, that the crown, in sending this letter to the lord chancellor, and directing him to order the judges in the terms of that warrant, exercises a power, not vested constitutionally in the kings of this country; that it is an illegal exercise of power, to attempt to interfere in any way with the practice and proceedings of the Common Pleas; and if it be true that it would be for the benefit of the public, that the exclusive right of audience of the serjeants should no longer continue, the proper mode of remedying the evil, is by the legislature (*b*), and not by the crown. As in the case of any other proceed-

Corporation
Justices.

Palace Court.

(*a*) But see Appendix, No. XXIV.

(*b*) Ante, 22, 24; post, 78.

*Sir W. W.
Follett.*

Rules altered
by Judges, not
by Crown.

ings of the courts in this country, which a change in the state of society have rendered prejudicial to the public, the alteration should be made by the legislature. No question can be more important than this, because if the crown can interfere, in any way whatever, with the practice and proceedings of courts of justice, where is the power to stop? The proper limit appears to be this,—that the crown has no power to interfere, in the slightest way, with the practice or proceedings of courts of justice—that this cannot be done in any case, or for any purpose—that any court once established, and regulated by known and settled rules, must proceed according to those rules in cases where the judges themselves have not the power to alter them. The judges in many cases may alter them, the crown in none; and therefore this warrant is illegal as a direct interference, not only with the privileges of the serjeants, but with the practice of the Court. This is an office, as old as the common law, created by the king's writ; the parties are sworn to perform the duties of the office, and when, from the most remote antiquity, no one has been admitted to practise in that Court without taking a solemn oath, what right has the crown to command, that in future, parties be admitted to practise in the Common Pleas, who have taken no oath? On that ground it is illegal. But independently of all this, the order is an illegal interference with the privileges of serjeants, with their rights, resting upon immemorial usage. Any office which has existed in any place or state, whatever name be given to it, cannot be destroyed by the exercise of the prerogative, but, if destroyed at all, its destruction must be effected by an act of the legislature. Upon these grounds it is submitted that the warrant is illegal. The question whether the judges of the Court have any power in this case is not raised, and is not meant to be argued. The judges of that Court did not profess to have, or attempt to exercise any such right. All they did was this: they said, "we have a letter from the king—that letter is read in open Court—we act in obedience to that letter." If that letter be illegal, it is not binding upon that Court. It is not necessary, therefore, to urge any thing against the power of the judges

of that Court. They have acted in obedience to the warrant. The question is, upon the legality of that warrant; and I venture to say that the issuing of that warrant was an illegal exercise of authority on the part of the crown.

Sir W. W.
Follett.

Mr. *Austin*, on the same side. I do not propose to touch upon the supposed expediency of this measure, although I, and perhaps the petitioners whom I represent, may have a strong opinion upon that subject. Nor do I mean to go into the question, whether, independently of an act of parliament, the object, supposing it to be expedient, might not be obtained by the act of the Court itself; although I strongly incline to think that, if that subject were considered, it would be found to be beyond the competency of the Court to make the alteration. I submit, that this document is invalid upon two grounds—first, there is no power in the royal prerogative to issue a document of this description,—secondly, the document itself is invalid for defects which are patent upon it. First, the crown has no prerogative by which a warrant of this description could be legally issued. The serjeants at law are an order of persons enjoying such a status and rank, by common law, that the crown cannot interfere with them. They enjoy an *office* in the common law with which the crown cannot interfere—and the interference of the crown upon this occasion, has been an interference with the constitution and course of one of the superior courts, an act not within the limits of the royal prerogative. There is no body of men in this country whose title can be traced further back than that of serjeants at law. In Madox's History of the Exchequer, chap. 6, sect. 2, and in the same work, chap. 19 and chap. 22, sect. 2 (a), (from which the very meagre statement in Reeves (b) and Blackstone (c) seems to be taken, and not very accurately taken,) will be found all the information which exists upon the subject of the serjeants at law, so far as history, or historical conjecture, is concerned. The Court of Common Pleas was, undoubtedly, definitively separated from the Aula Regia, by the charters of *John* and *Henry*

Mr. *Austin*.

Expediency, not
for discussion.

Two objections.

Incompetency
of prerogative to
issue warrant of
1835.

Serjeants enjoy
an *office*.

(a) Folio edition, 141, 539, 546, 594; quarto, vol. i. 214, 788, 799.

(b) Reeves' Hist. of the Law, vol. i. 57. (c) 3 Bla. Comm. 37, 40; *ante*, 6.

Mr. Austin.

Origin of Common Pleas.

Antiquity of Court of Common Pleas.

III. In what way the Common Pleas, or the other two superior Courts, as well as the Marshalsea, which was an emanation from the Aula Regia, formerly existed, it is absolutely impossible, in our days, to ascertain. It is exceedingly improbable that the Common Pleas or the other Courts were created at the time of those Charters, for at that period, and long before, there is a well ascertained division of pleas into common pleas, pleas of the crown, and others; and long before the Charter of *John*, the Common Pleas is spoken of with a distinctive name, it is called sometimes the Bank, and the judges are called justiciarii de banco with other names, recorded in *Madox* as early as 7 *Richard I.* (a). By a roll of that date it appears that "*William des Blez* gave Xs. to have a recognition of novel disseisin at *Westminster*." It is not "*apud Curiam Regis*," which was the title of the Curia Regis, but "*apud Westmonasterium*;" and in the 19th chapter of *Madox* (b) will be found a vast number of rolls commencing from that date, in all of which are pleas in real actions, the title of the Court being "*coram Justiciariis Regis de Westmonasterio*," or "*apud Westmonasterium*," or "*in Banco*," or "*coram Justiciariis de Banco*." It is not possible to trace the existence of the Common Pleas beyond the time of legal memory. This circumstance appears to strengthen the case of the petitioners. The words in the great charta, "*Communia placita non sequantur curiam Nostram, sed teneantur in aliquo loco certo*," do not imply the creation of a new Court. They speak of a Court as already established, and the theory usually adopted with respect to this Charter is, that they were not enactments of new provisions, but mere restorations of certain antient laws commonly known by the name of *Edward* the Confessor's (c). But whatever may be the history and antiquity of the serjeants or of the Court of Common Pleas, that Court has been always treated by lawyers and the Court itself, as of indefinite antiquity. In 2 *Inst.* 23, is a quotation from the Year Book

(a) See Appendix, No. II.

(b) Hist. Exch. folio edition, 539; quarto, vol. i. 788.

(c) *Quære* of this theory. The greater part of the provisions of *Magna Charta* are corrections of abuses in the application or administration of the feudal system, a system unknown in England in the time of the Confessor.

9 *Edw.* IV. 53 (a), of a resolution of the judges to this effect, "That the Courts of King's Bench, Common Bench, Exchequer, and Chancery are the king's courts, and have been time out of memory." That appears to be much more important than any historical conjectures to be found in *Madox's History*, because that is the determination of the Court itself (b); and if the matters of fact upon which they may have come to that determination were not correct, nevertheless, as the determination has been promulgated by the Court, that itself becomes a principle and ground of law. Many a custom, regulating most important private rights, has been established by the verdict of a jury, founded upon evidence which may possibly not have been correct; but, at the same time, when the verdict of a jury has once been come to, it never can be permitted, for the sake of public convenience, to re-open a decision of that sort (c). [Lord *Chancellor*. Is this more than an opinion given—was it the foundation of any decision?] It was necessary, in the course of the cause, to decide that. The question was upon the form of a certain writ (d). The antiquity of the Court has been traced (e) so early as 7 *Rich.* I., and there have been decisions of that Court from that time downwards; from which it may be inferred that Courts of Westminster Hall, including the Common Pleas, existed immemorially; and there is no time at which it can be shewn that the serjeants were not an order having exclusive audience in that Court. In the preface to the 10th Reports, Lord *Coke*, representing the general opinion of

Mr. Austin.

Conclusiveness
of verdicts.

Antiquity of
Common Pleas.

(a) H. 9 E. IV., fo. 53, pl. 18, *Justice Younge's case*. And see P. 10 E. 4, fo. 4, pl. 9.

(b) "Et tous les justices (in the Exchequer Chamber) tiendront, sans question, que tous sont les Courts le Roy, et ont este de temps dount memory, isint home ne peut saver, que deux est plus ancien Court," &c. H. 9 E. IV., fo. 53, pl. 18.

(c) *Quære* of this, except in cases of estoppel.

(d) *Illingworth*, C. B. asked the judges in the Exchequer Chamber, whether, in the Exchequer, they ought to allow a writ of *supersedeas*, brought by the clerk of the Hanaper who was sued by *Younge J.* in the Exchequer, whereby the clerk of the Hanaper claimed to be impleadable only in the Court of Chancery. But before suing out the *supersedeas* he had entered an *imparlance* in the Exchequer, and thereby admitted the jurisdiction of that Court, the authority of which was coeval with that of the Court of Chancery. H. 9 E. IV., fo. 53, pl. 18.

(e) *Ante*, 68.

Mr. Austin. lawyers at that time, attributes the existence of serjeants to a period far higher, he speaks of them as existing before the Conquest—he grounds that opinion, to a certain extent, upon the passage which has been already quoted from the *Mirror* (a). Now, the language he employs upon that, is important to be attended to—he says, the substance of that book was written before the Conquest. *Horne* lived after the Conquest, as it is supposed (b), in the time of *Edward I.*: he made additions, and, as it were, edited the book; but the substance of the book, Lord *Coke*, and all the lawyers of that time, attributed to a period before the Conquest. Then, if that be so, and if it be not possible to assign any particular period at which the *Mirror* was written, there is distinct evidence of the existence of a body of men denominated “countors” or serjeants, beyond the period of the existence of the Court. There is no time in which it can be shewn that serjeants did not practise with their present privileges, nor can it be shewn that there were other practitioners in the other Courts. In the English translation of the *Mirror*, the passage which has been cited is (b), “There are many who know not how to defend their causes in judgment, and they are many who do; and therefore pleaders are necessary, so that, that which the plaintiffs or actors cannot or know not how to do by themselves, they may do by their serjeants, attorneys, or friends.” That is not a correct translation. In the original (and so it is quoted by Lord *Coke* (d)) it is “There are many who know not how to pronounce and prosecute their causes in judgment, and there are many who *may* not do so.” This being referred to in the body of the chapter, “and therefore pleaders are necessary, so that what plaintiffs or actors cannot or may not do by themselves, they may do by their serjeants, procurators, or friends.” The meaning of the entire chapter appears to be this—There are two sorts of business to be done in prosecution, one by the countor or serjeant—another sort to be done by the friend or procurator, whom we now call the attorney. The only persons spoken of as pleaders, are the serjeants or countors.

(a) *Ante*, 30, 31, 32.(b) *Horne* mentions *Edward II.*(c) *Cap.* 2, 55, *ante*, 31.(d) *Pref.* 10 *Co. Rep.* xx.

With this key to the entire chapter, its meaning will be clear. If that be the true reading, the *Mirror*, a book of great antiquity, is an authority to shew, as matter of fact, the existence of serjeants,—the existence of countors,—serjeants and countors being the same persons (*a*),—at a period beyond which there exists no record proving the separate existence of the Court of Common Pleas itself. In 1648 there was a general call of serjeants by authority of parliament, a call which was subsequently held to be invalid (*b*). Upon that occasion, according to the custom of those times, a speech was made to the newly called serjeants, in the person of *Oliver St. John*, afterwards chief justice, by *Whitelock*, a commissioner of the great seal; and in that speech there is a long deduction of the history of the order of serjeants, and, what is important, he adopts the views which had been scattered up and down in several books of great antiquity. He treats the order of serjeants as existing time out of mind, even before the Conquest, and refers to many authorities by which that position is to be maintained. The substance of this speech is given in a tract of Serjeant *Wynne's* (*c*). It is inserted at length by *Whitelock* in his *Memorials* (*c*). From an old edition of *Fortescue* by *Waterhouse*, himself a learned apprentice (*d*), with a very voluminous commentary, it appears that upon a similar occasion of a call of serjeants in the time of *Charles I.* Lord *Coventry*, then lord keeper, addressed the serjeants in the same way as *Whitelock* afterwards did, concerning this order and degree (*e*). In this book, which is a very learned commentary on *Fortescue*, the Court and the order of serjeants are treated as existing in the common law. It is true, that no distinct mention of the serjeants has been found in any other public document which has been examined for this purpose, till we come to the statute of Westminster the 1st (*f*); but the way they are there mentioned is most material. In the common editions of the statute, there is a very strange, yet very natural, misprint, in the 29th chapter of Westminster the 1st. That statute was passed for the

Mr. Austin.

Whitelock's
Speech.

Lord Keeper
Coventry's
Speech.

Westminster
1st.

(*a*) Vide 2 Inst. 213. (*b*) Such of the serjeants, made in 1648, as survived the restoration, were recalled by writ. 1 Siderfin 3.

(*c*) Appendix, XXXII.

(*d*) Appendix, I. XIII.

(*e*) See Appendix, XXXI.

(*f*) 13 Edw. I, c. 29.

Mr. Austin. purpose of regulating the conduct of the serjeants and others attending the courts, and the language is this, "It is provided also, that if any serjeants, countors, or others, do any manner of deceit or collusion in the King's Court, or consent to do so in deceit of the Court, to beguile the Court or the party, and thereof be attainted," and so forth;—and then it goes on to provide what the penalties are to be. In the common edition there is a comma between serjeant and countor, by which it is made to appear, that serjeant is the name of one officer, and countor the name of another; but Lord *Coke* does not make the distinction, and he reads it as it ought to be read "provided any serjeant-countor;" and we have seen that serjeant and countor are said to be equivocal, that is, serjeant-countor is all one name; and therefore the statute will read thus, "that if any serjeant-countor, or any other person," that is to say, procurators or friends, "should do any damage or so forth, they shall be subject to imprisonment for a year and a day, and they shall not be heard to plead in the Court, and shall be fined;" and Lord *Coke* cites the *Mirror*, amongst other authorities, for the commentary which he makes upon the statute. But the words of the statute shew perfectly well, that the state and order of serjeant-countor, was one well established and recognized in the reign of Edw. I., when this statute passed. [Lord *Denman*. *Chaucer*, in his *Canterbury Tales*, speaks of the serjeant and his counting(a).] The fact that no more antient records can be found upon this subject may perhaps be accounted for thus: *Edward* I. legislated most extensively upon the administration of justice; and for the purpose of weaning the people from prescriptive usages, after new laws were passed, he became a great destroyer of records. Considering all these matters, it would be exceedingly difficult to shew any estate, any rank, any dignity, any position, of whatever nature, in this country, founded upon a title more antient than that of the serjeants at law, with one single exception; that of royalty. Of no estate can higher evidence be given than of the estate of a serjeant at law. *Whitelock* argues in this way: he says, "In the book

Deceit of the Court.

Serjeant-countor.

Chaucer.

(a) In Chaucer the serjeant and the countour appear as two distinct characters. See Appendix, No. XII.

of entries, in a bill of debt against a serjeant at law in the Common Pleas, he shews and prescribes, that serjeants could not be sued there by bill, but by writ out of chancery. And this being by prescription, shews that serjeants were before the time of *Richard I.*" That undoubtedly is a technical argument, but it seems to be a legal and sufficient argument. In *Paston v. Genney* that question is debated. It does not appear in the Year Book what the decision of the Court was; but in *Brooke's Abridgment* and *Rolle's Abridgment* that judgment is given,—that by prescription, a serjeant is to be sued by original writ. In *Viner, Prescription*, A. the same case and the authorities are cited, and it is there laid down as law, that a serjeant is to be sued by original in the Common Pleas. It seems to be very immaterial, for the purpose of this argument, to shew precisely the earliest date at which serjeants are spoken of in these books; for there can be no doubt, that the Common Pleas is an immemorial Court, and that the officers are officers of prescription. It cannot now be contended that the Common Pleas is not an immemorial Court; then it is quite clear that none but a serjeant can, by the common law, be a judge of the Common Pleas. That is laid down 4th Institute, 75, 72, and 100, in Comyns's Digest, title "Courts," in the preface to the 10th Report, in the 50th chapter of Fortescue and in several other books, that none but a serjeant can be appointed a judge of the Common Pleas or King's Bench. Then, if the Common Pleas is immemorial, the judges have also an immemorial title; if the judges of an immemorial Court must be serjeants, *a fortiori*, the serjeants are so, immemorially; nor is theirs the only office existing immemorially in the Common Pleas; the office of exigenter (*b*) and the office of prothonotary are immemorial (*c*). Several offices in the King's Bench also are held by prescription as having existed time out of mind, or because no man can shew when the offices began. This being the antiquity of the office, and this its connection with the Common Pleas, the office of serjeant, or the state of serjeant, has always

Mr. Austin.

Paston v. Genney.

Antiquity of Serjeants.

Serjeants alone can be judges.

(*a*) Com. Dig. title Courts (C 5); Dyer 175 b.

(*b*) 18 Vin. Abr. 110; Dyer 150 b.; Com. Dig. title Courts (C 4); 3 Shepherd's Abridgement, 43.

Mr. Austin. been held as now. There is no time when any difference can be pointed out, in the state of a serjeant, from that which exists at the present time. He was always created by writ. In 2 Inst. 214, several rolls are cited, and cases mentioned, by which that is proved beyond question. It is an office which certain persons have always been liable to fill, which they might be compelled to fill, by writ. The writ has always been in the same form. In other cases beside *Cary's*, on the rolls and in the books, persons have been fined for not taking upon them the degree of serjeant.

Office of Serjeant, compulsory.

Cary's case. In *Cary's case* (a) the fine was levied and afterwards remitted, and at a subsequent period the name of *Cary* appears as a serjeant; so that he refused to obey the writ originally; and upon process against his goods or against his property, he took upon himself the degree of serjeant, and then the fine was remitted. [*Bosanquet J.* The amount of the penalty has been altered; formerly 100*l.* now 1000*l.*] In Lord *Coke's* Commentary on the Statute of Westminster, he says, "precisely as it is now, and at all times has been, has a serjeant thus appointed, and thus sworn, had exclusive audience in the Court of Common Pleas." This also appears from the 50th chapter of *Fortescue*, from *Paston v. Genney* (b), and from the Mirror. The estate of serjeant is also an estate for life; an estate formerly represented as being onerous to the party who was compelled to take it upon himself, rendering it necessary for him to incur considerable expense; rendering it necessary for him to attend the Court of Common Pleas, which is part of his oath at the present day. It was also, on the other hand, beneficial to him; because, if it did not directly give him a right to salary, it gave him pre-eminence and exclusive audience, and he was by the writ called into an order of men from whom alone the judges could be selected (c). According to the language of the writ, the language of the oath, and the language used touching the estate of the serjeant, in all the antient authors, the public were provided, on their most material occasions, with a body of pleaders,

Duties and advantages of office.

(a) *Ante*, 35, 36.(b) *Ante*, 39, 73; *post*, 89, 138.(c) The antient practice of appointing judges from amongst the serjeants has, of late years, been eluded by making the intended judge a serjeant *pro re natâ*,—an occasional serjeant.

not the appointees of the crown, but persons recommended by the judges ; a circumstance which is dwelt upon by *Forrescue*(a) in his chapter on this subject ; so that they were, as we know, not only according to theory, but in practice, appointed without taint or suspicion of taint of any improper motive. On the other hand, this body of pleaders was not a *limited* body—there could be no monopoly—in that respect differing from the Marshalsea Court and other courts that have been mentioned—because the number is unlimited, the crown having a right to call to that estate any number that might be thought necessary ; and I suppose, that we are to presume, that the crown would call a sufficient number by whom the business of the Court could be carried on. This order of men has been called to attend the parliament. The earliest roll is of the date of 10 *Edw.* III. (b) : they were appointed triers of petitions ; they acted (if they do not act to this day) with the judges and with the masters in chancery ; in this capacity, common bills sent down by the lords to the commons, are sent by the masters in chancery ; and crown bills, or bills affecting Her Majesty, are taken down by the judges, or by the serjeants at law, a body of men who from all time have held an assigned rank and precedence in the country. Such are the incidents which are to be found to this state and degree of a serjeant. Then how has this state and degree been held ? By the same title as that by which the Court itself exists. It is held by immemorial usage ; it is part of the common law, than which it is impossible to conceive any higher title ; the state and degree of a serjeant at law, with its incidents, being held at the common law, it cannot be affected by the exercise of the prerogative of the crown. This country has been called by Burke, “ a country of prescription ” (c), it is eminently a country of prescription ; nor, for any of the highest offices, or the most important estates that are enjoyed, will it be possible to shew a clearer, if so clear, a title than for that of serjeant at law. An estate and rank of this description cannot be altered by the prerogative. It is stated in *Co. Litt.* (d),

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Number of serjeants unlimited.

Serjeants' tenure of office.

(a) *Fort. de Laudibus*, cap. 50.

(b) *Appendix*, No. XXV.

(c) *Appendix*, No. XXVI.

(d) 90 b.

Mr. Austin.

and in Comyns's Digest (a), and in the other Digests under the same title, that the prerogative is nothing more than the rights, immunities, privileges, and the like, vested in the crown by the common law; and that the prerogative cannot affect the common law. "Whatever is by the common law, can only be affected by statute." Co. Litt. 115 b. During the whole tract of time to which the attention of the Court has been drawn, no interference of the crown, whatever, can be shewn. The crown has interfered to regulate precedence in the Common Pleas; but that can hardly be called an interference of the crown, because the giving to one serjeant precedence over another, inter se, cannot be said to affect the residue of the rights of that order of men. The history of the precedence given by the crown appears to be this, that it was conceded by courtesy, originally, by the rest of the members of the bar, to those advocates who appeared on the business of the crown. That, no doubt, is the cause of the difference in the practice which exists, between that which prevails at the present time, and the time when Lord *Bacon* complained that a serjeant at law offered himself to be heard before the attorney general (b); because, at that time, there can be no doubt there was no serjeant who had not pre-audience of the attorney general and solicitor general. At the present time, not only have the attorney and solicitor-general, but the king's counsel, who have not the degree of the coif, pre-audience before the serjeants. That is to be explained in the same way; the king's counsel were originally what their name imports, advocates employed upon the king's business; and for convenience, and as matter of courtesy, other persons gave way to the king's counsel. With respect to this order of precedence, it seems to be an important circumstance, that a serjeant does not lose his right, or status, by becoming a judge, a master of the rolls, a commissioner of the great seal, or a lord chancellor. [Lord *Brougham*. Lord *Eldon* called Serjeant *Palmer* (c) "Brother *Palmer*," every day he moved.] Many of the judges practised in old times after they had been

(a) *Title, Prerogative, (A.)*

(b) *Ante, 55; post, 126.*

(c) *Vide ante, 21, as to a serjeant practising in Chancery.*

removed from the bench. Sir *George Hutchin*, "having been the king's serjeant and afterwards made one of the commissioners of the great seal, and after having been discharged of that employment, insisted that his right of king's serjeant remained, not extinct by having been one of the keepers of the great seal, being collateral to the coif, no more than a serjeant's being made a judge, though he be afterwards degraded from his place of a judge, extinguishes his place of a serjeant; for determination whereof, the lord keeper *Somers* convened the judges, and there it was resolved by all, that he, being one of the keepers, had extinguished his place as king's serjeant, as acceptance of a judge's place extinguishes his place of king's serjeant." (a) [Lord *Brougham*. Then do you hold that a king's counsel, being made a judge, ceases to be a king's counsel?] A king's counsel is only an ordinary counsel, acting for the king—as judge, he can be counsel for none; and therefore, by accepting the office of judge, the other employment is gone. It does not differ from the case of the attorney and solicitor-general; they are all counsel for the crown, and their places are lost by an advancement to judgeships. But the object for which Sir *George Hutchin's* case is cited, is, to shew, not that a judge is a serjeant, but that the interference of the crown in regulating the precedence of the serjeants, is not an interference which proves any right in the crown to regulate prescriptive rights, and also to shew that a judge loses precedence, whilst, according to the language of the case, the place of serjeant remains. From which I infer, that the precedence is no part of the place of serjeant. The office of king's serjeant is a mere office conferred by the crown, collateral to the place of serjeant itself, and no instance can be shewn of the interference of the crown with the rank and station of a serjeant at law. With respect to the mandate of the crown, issued for the purpose of enabling the attorney general to lead a solicitor general who was the king's antient serjeant (b), that was a document which did not regulate the precedence of individuals, but of certain offices; and the precedence of the offices themselves is not regulated by that document as regards the *Common Pleas*. Supposing that document

Mr. Austin.

Merger of their office.

King's Serjeant.

Warrant of 1814.

(a) 3 Levinz, 351.

(b) *Ante*, 19.

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Proposed alteration in 1775.

to be legal, it is inapplicable to the present case, because that has no effect whatever with respect to precedence in the Common Pleas. The attorney and solicitor general, at the time that document was recorded in the Common Pleas, could not be heard in that Court; and therefore, to say that the attorney and solicitor general shall have precedence over the king's serjeant, may be saying something available in the Courts of King's Bench, Exchequer and Chancery, but it is saying nothing to the purpose in the Common Pleas. Where any alterations have been made, touching the estate of a serjeant at law, they have been made by act of parliament. The case in *Wynne's Tracts* (a), was a proposition of the lord chief justice of the Common Pleas. That alteration was proposed to be made by act of parliament, and the propositions were submitted by the lord chief justice in the shape of heads of a bill. It did not occur to him that it could be made by the crown. There are two modern acts relating to the creation of serjeants, 39 *Geo. III.* c. 113, and 6 *Geo. IV.* c. 95. The first of these acts was passed for the purpose of enabling the crown to make serjeants in vacation, in order that the crown might make judges in vacation. The preamble recites, that judges can only be made of the degree of the coif. Upon a review of the authorities, there is no instance whatever of any interference by the crown; and when any interference has taken place with this rank and state, it has been made by act of parliament. It is difficult to say, in what respect the state of a serjeant at law differs from, and why it should not be called, an office. It seems to be strictly an office, and an antient office. In Cruise's Digest, *Offices*, s. 5, (quoting 4th Institute (b)), it is laid down, that there are a great number of offices which have existed time out of mind, and therefore said to be derived from immemorial usage. Is not this an office? The parties are called by writ, and they are compelled to obey the mandate. In *Rex v. Larwood* (c), it is laid down,

(a) *Ante*, 21, 22.

(b) Lord Coke says, "For it is a rule in law, that antient offices must be granted in such form and such manner as they have used to be, unless the alteration were by authority of Parliament." 4 *Inst.* 75. The words in the text appear to be Cruise's own.

(c) 1 *Ld. Raym.* 29.

that the king may compel a subject to serve him in certain capacities. It is said, and truly, that the king may compel a man to assume and act in the office of sheriff, and other offices are mentioned. So the king might compel a person of 20*l.* a year in land, to assume and take the estate of knighthood, clearly upon the ground of its being a public duty (*a*); and that will accord precisely with the duty of a serjeant, because, by his oath of office, he is sworn not to attend to the behests of the crown alone, but to serve the king's people as one of the serjeants at law, to counsel them that he be retained with, and not to delay their causes, and to give due attendance in the Common Pleas. There is a material distinction between the case of a serjeant in the Common Pleas, and that of an ordinary advocate. The serjeant does not occupy the place of an ordinary advocate, he is the serjeant-countor or narrator, and his duty, originally, was to frame the pleadings in each cause in the Court; and he, and not the friend of the party, was liable for those pleadings, for deceit in pleading, or for interrupting the due course of justice in that particular. And that may also account for that antient rule, that a serjeant's hand must be put to all pleas in that Court (*b*). In the Year Books, it is uniformly stated, that the serjeants appeared. The plea was *ore tenus*; and when that became inconvenient, it was natural that the serjeant's signature should be affixed to the document, and that was the origin of that practice. It has been suggested, that this could not be an office, because no fees are attached to it. It is not necessary that fees should attach in order to constitute an office; but I will shew that fees *are* attached. In the passage cited from the Mirror (*c*), every pleader is bound to serve the common people, or those who have need of them, *for their fees*. And afterwards, in the 4th section of that chapter it is stated, "The fourth thing is, as to his salary, concerning which four things are to be noted," so that the word 'fees' and the word 'salary' are used; and it is so in the original; the words 'fees' and 'salary' are distinctly mentioned in this antient treatise. And in the pre-

Mr. Austin.

Serjeants originally sole pleaders in C. P.

Serjeants' fees

(*a*) See Appendix, No. XXVII.

(*b*) *Ante*, 23, 58, 59.

(*c*) *Ante*, 31.

Mr. Austin. ceding chapter (a), section 4, which treats of rewards and fees, it is stated, with regard to the judges who serve the king, that it is lawful for them to take twelve pence from the plaintiff, after hearing the cause, and no more, though there be two plaintiffs; and the pleader, six pence. Now the pleader is a serjeant-countor, so that there is something exceedingly like an antient payment, both in respect to its amount, and the mode in which it appears to be reserved: "and a knight sworn a witness four pence, and every juror four pence, and the two sumners four pence;" and then it goes on to say, that in the time of king *Henry I.* the judges were forbidden to take the fees, but not the serjeants; therefore their fees remain—therefore it can be shewn that they have fees. An instance has been found in which an action has been brought for fees by a serjeant, *M. 21 Henry VI. fo. 4, pl. 5, and fo. 4. pl. 6. Newton* asked of *Fortescue*, the chief justice, this question, "An attorney of this place brings an action of debt for his salary, and declares that he was retained with the defendant in the office of attorney &c.,—whether the defendant can wage his law?" *Fortescue* says "No, because the party can compel him to be his attorney against his will; but if the action be brought because he was attorney in an *inferior* Court, the defendant should wage his law." So noted, agreed 6 nota in *E. 3 Henry VI. pl. 13. "Pole*, serjeant, brought a writ of debt, and declared that he was retained to be of counsel for the defendant for two years, taking by the year 10*l.* The defendant waged his law (b); and it was held by all the justices that he ought to have his law, notwithstanding that it was shewn to them that a serjeant is compellable by law to be of counsel with any person as well as a serjeant is compellable to serve: wherefore, &c." That case is thus cited by *Rolle (c)*: "If a serjeant at law brings writ of debt, and declares that he was employed to be of counsel for the defendant for two years, taking by

Action by ser-
jeant for his
fees.

Attorney's

Wager of law.

(a) *Mirror*, chap. 2.

(b) As to the cases in which this mode of trial, by the oath of the defendant and his compurgators, was allowed, see *Com. Dig. title Wager of Law*; 15 *Vin. Abr. title Ley Gager*. It is now abolished by 3 & 4 *Will. IV. c. 42*.

(c) 2 *Roll. Abr. Ley Gager*, 108.

the year 10l., defendant may wage his law, though the serjeant be compellable by law to be of counsel for any; but this is by contract for the year." And in 1 Viner's Abridgment, 63, (a) this case is cited from Brooke's Abridgment, "Brooke says, it seems that he is not compellable to be of counsel for a whole year, or for two years, or for any fee certain for the whole year; that would be so." There is no authority for saying that a serjeant is compellable to be of counsel for a certain time. It is apprehended his duty is this: he is bound to attend in the Common Pleas, and during his attendance there he is bound to be serjeant for such as make the necessary application to him, and have the necessary business to transact. If this action of debt had been brought by a serjeant for services performed in any given cause, there would have been no wager of law, but the action would have lain. It is not to be wondered at, that an action of debt has not been brought lately for serjeant's fees (b). Fees, however, are not necessary for the purpose of shewing that this is an office. It is quite sufficient that it be a place of pre-eminence, although no fee should be attached to it. There are many prescriptive places, which are undoubtedly offices, to which no fee is attached. A serjeant is also, by virtue of his place, exempt from attendance upon the king in war; that is to say, he is exempt from a public duty; 11 *Henry VII.* cap. 18. An authority to the same effect may be seen in Dugdale's *Origines*, 137; and in that same book, chapter 51, it appears that serjeants at law were originally exempt from taking the degree of knighthood. "It seems," he says, "that those of this degree were not antiently made knights; for I find that Serjeant *Rolfe*, likely to be fined, pleaded his privilege that he was a serjeant at law, and bound to attend the Court of Common Pleas, and not elsewhere (c)." The serjeant's office or place is for life; and upon a review of all the incidents it appears

Mr. Austin.

Duty of Serjeants.

Debt, for fees.

Serjeants, exempt from military service and from knighthood.

Their office, held for life.

(a) Bro. Abr. *Ley Gager*, pl. 45.

(b) *Quære*, whether fees would be recoverable, except upon a special contract. *Vide* 6 Vin. Abr. 478; *Jenkins v. Slade*, 1 Carr. & Payne, 270; *Crammond v. Crouch*, 2 C. & P. 77; *Poucher v. Norman*, 3 Barn. & Cressw. 744, and 5 Dowl. & Ryl. 648; *Davies v. Sibley*, 6 D. & R. 4; Appendix.

(c) Appendix, No. XIV.

Mr. Austin.

Law as to antient offices.

that this place is an office. It is laid down in *Humphries v. Paget* (a), that if one cannot be turned out of an employment without cause, that is an office. It is exceedingly difficult to find any in the books—any adequate definition of an office; but taking into consideration all these incidents, it appears to be clear that this is an office; and from the two instances in *Dugdale* (b), it is clear that a serjeant can only be discharged by writ. This being, therefore, an antient office, the law which is applicable to antient offices is applicable to the degree and state of a serjeant. Now what is that law? In 4 Inst. 75, and 3 Cruise, *Office*, sections 8 and 9, where the cases are collected, this rule is laid down in the most express and unequivocal terms, that antient offices must be granted as used, unless altered by act of parliament. That is the language of the 4th Institute (c); the reason being plain enough, that if they were not granted as used, they would not be the *same* offices. So it is clear, that before the statutes (d), the crown would not appoint a judge of the superior Courts for life; Bacon's Abridgment, *Courts A*. Nor could the crown grant the office of judge, reserving the appointments and the offices incidental to the judgeship—the whole appointment would be void, as in the case cited of the office of exigenter, the case of *Skrogges v. Colsehill*, in *Dyer* (e); with reference to which case it may be observed, that the pretended appointment by the crown took place during the pretended vacancy of the chief justice. In *Mitton's* case (f), and in the notes by the late editors (g), that that was a case in which the crown affected to appoint a Court, and that was likened to this case. It is, as if the office of sheriff were granted, reserving the appointment of clerk of the county court. From the case of the *Duchess of Grafton v. Holt* (h), the same

(a) 1 Keble, 689. And see *Goody v. Clerk*, 2 Crompt. Mees. & Rosc. 273, and 1 Gale, 177.

(b) *Origines*, 139, 140.

(c) 4 Inst. 75, 87.

(d) *Appendix*, XXX.

(e) *Dyer*, 175; *ante*, 52.

(f) 4 Co. Rep. 32 b.

(g) The notes, as far as the 4th part, were by the late Mr. Thomas; the subsequent notes are by Mr. Fraser.

(h) *Skinner*, 354; *ante*, 54.

inference is deducible. So in 2d Salkeld, 439 (a), a grant of the office of marshal of the King's Bench, reserving the office of chamberlain, was held to be a void grant. If, therefore, this state of a serjeant be an office, the crown cannot infringe upon this, one of its antient incidents. But supposing it should be thought that it is not an office, the rule applicable to antient offices would be as strictly applicable to the state of a serjeant, enjoyed, as it unquestionably is, by immemorial usage. The case is the same in every particular, and no reason can be assigned why a different rule of law should apply. Could the crown exclude the serjeants from the Common Pleas? Could the crown limit the number of serjeants in the Common Pleas? And which, perhaps, is a still stronger case, could the crown impose a new oath, or alter the writ? There is great authority in answer to that last question. In the introduction to Croke Charles, by Sir Harbottle Grimstone, and in Sir William Jones's Reports, 63, slight irregularities in the writ were held to vacate it. One was this; the return was *immediatè*, and the writ was vacated, and a new writ issued, upon which the serjeants were called; and on account of the omission of various ceremonies, usually performed upon the admission of serjeants at law, the call was held to be irregular, and a new call took place. It will be scarcely contended that the king could alter the writ, or direct that a new oath should be imposed, or that any of the alterations could be made by the crown which are suggested—then how could the crown admit other counsel to an equal audience in the Common Pleas? That is a diminution of the privileges enjoyed by the serjeants—an interference with the usage of the office. Could the crown make a serjeant, reserving or excepting the privilege of exclusive audience? Would a writ with any such reservation be a valid writ? To admit, as has been done by this warrant, other counsel, to equal audience in the Common Pleas, is a diminution of the antient privileges of the office of serjeant. And it is clear law, that the crown cannot grant any franchise or privilege interfering with an established franchise or privilege, whether it be

Mr. Austin.

Incidents cannot be excepted out of grant of office.

Exclusion of Serjeants.

Restriction as to number.

Deviation from antient form of oath or writ.

Diminution of privileges of Serjeants.

(a) Anon. 3 Anne.

Mr. Austin. immemorial, or existing by grant or charter. Much learning upon that subject will be found in 2 Inst. 406, where Lord Coke is treating of grants of fairs or markets. In the grant of a fair or market there is the usual clause, "ita quod," &c. But it has been held, that this need not be expressed, because it is implied in law; *Rex v. Butler* (a).

Grants of fairs
and markets.

Coronation
offices.

I submit, therefore, to your lordships upon both these principles, that the crown cannot interfere, whether the state of a serjeant be an office, or a state existing by immemorial usage. There are many offices with respect to the coronation, in derogation of which the king could not make a new grant—offices that are merely honorary (b); and yet with respect to those offices, it cannot be contended that the crown could either alter the original forms, or make a new office in derogation of them. [Lord *Brougham*. Have you any instance of an assise of office being brought, where there were no fees or emoluments? I have been looking into Comyns's Digest, and can find none (c). The modern mode of trying it (d), would not do, because that implies fees; but an assise of office, one should think, is not so strict.] It would rather seem that an assise could not be brought by a serjeant at law. [Lord *Brougham*. Then you get upon rather dangerous ground. If a serjeant comes for a remedy for a disturbance, might there be an action upon the case for a disturbance, all the serjeants joining, as all the Dippers (e) did, as one plaintiff?

Lord *Cottenham*, C. We will proceed with this on the 2d of February.

Adjourned.

(a) 3 Lev. 220; 2 Ventr. 344.

(b) These offices are said to be honorary, (or rather honorable,) in respect of their connection with the person of the sovereign; but to most of these offices fees are attached, the right to receive which may be said to have been infringed by the regulations made at the last two coronations.

(c) *Title*, Assise (B. 2, 3); and see F. N. B. 179 K, n. (a).

(d) By action for money had and received. As to the origin of this mode of trying the title to an office, see *Howard v. Wood*, Sir T. Jones, 126; 2 Levinz, 145; 2 Show. 21; *Earl of Montague v. Preston*, 2 Ventris, 170; *Rains v. Commissary of Diocese of Canterbury*, 7 Modern, 147; *Gifford's case*, 1 Salk. 333.

(e) In *Weller v. Baker*, 2 Wilson, 414; post, 117.

AT A MEETING
OF
THE JUDICIAL COMMITTEE

OF
Her Majesty's Most Honourable Privy Council,
COUNCIL OFFICE, WHITEHALL,
Saturday, 2d February, 1839.

PRESENT:

MARQUESS OF LANSDOWN, P.^(a)
LORD COTTENHAM, C.
LORD WYNFORD,
LORD BROUGHAM,
LORD DENMAN, C. J.
LORD LANGDALE, M. R.
SIR LANCELOT SHADWELL, V. C.
LORD CHIEF JUSTICE TINDAL,
LORD ABINGER, C. B.
MR. JUSTICE VAUGHAN,
MR. JUSTICE BOSANQUET,
MR. JUSTICE ERSKINE,
STEPHEN LUSHINGTON, D.C.L. Judge of the Court
of Admiralty. ^(b)

Second Day.

MR. AUSTIN. (*In continuation.*) Upon the former occasion I contended that the rights and the duties of the serjeants at law were enjoyed and prescribed by antient usage—that that usage has been uninterrupted, neither interrupted on the part of the crown, nor by any other authority—that there were only two instances of any interference with it,

(a) His lordship was not present on the 10th of January.

(b) Mr. Baron Parks, who had attended on the 10th January, was not present at the sitting of the Court, but arrived during the argument.

Mr. Austin.

Warrant, an
interference
with constitu-
tion of an an-
cient court.

Judicature com-
mitted by King
to his courts.

Jurisdiction of
King's Bench
in case of
Common Pleas.

those modern and of comparatively little importance, and both by the authority of parliament—and that, upon that ground, the legality of this warrant could not be sustained. This is the principal ground upon which I rely, as these considerations appear to be clearly decisive of the present question. But the same proposition may, it is submitted, be supported, on the ground that the exercise of the prerogative in the present instance, is an interference with the constitution and proceedings of one of the ancient Courts. In 4 Inst. 71, this is laid down: “The king hath committed all his power judicial, some in one Court and some in another, so as if any would render himself to the judgment of the king, in such case where the king hath committed all his power judicial to others, such a render should be to no effect. And 8 *Hen.* VI., the king doth judge by his judges, the king having distributed his power judicial to several Courts, and the king hath wholly left matters of judicature according to his laws to his judges.” In the next page (a), where Lord *Coke* is referring to the various means by which the Court of King's Bench acquired its civil judicature, is this passage: “If any person be in the custody of the marshal, be it by commitment, or by latitat, bill of Middlesex, or other process of law, it is sufficient to give the Court jurisdiction; and the rather, for that the Court of Common Pleas is not able to dispatch all the subjects' causes, if the said actions should be confined only to that Court, and seeing none but serjeants at law can practise in the Court of Common Pleas, it is necessary that in this Court of King's Bench, apprentices (a) and other counsellors of law, might by experience enable themselves to be called serjeants afterwards, otherwise serjeants must want experience, which is the life of their profession, and the proceedings of that Court for so long a time, and under so many honourable judges and reverend sages of the law, hath gotten such a foundation as cannot now, without an act of parliament, be shaken.” The entire chapter “Of the Court of King's Bench,” contains many maxims of the same description. The case of Prohibitions

(a) 4 Inst. 72.

(b) Appendix, No. I., XIII.

in the 12th Report (a) is a case of great importance upon this subject. The same propositions are repeated in the 2nd Institute (b), and in *Comyns's Digest* (c). In the 4th Institute (d), Lord *Coke*, in treating of antient courts of chivalry, lays down the proposition in this form, "no addition either of persons or of jurisdiction can be added to this court (of chivalry), unless it be by act of parliament; for *antient Courts* ought to be exercised according to the antient and right institution." It follows from this doctrine, and it will hardly be disputed, that although the crown may vary the number of judges, that being consistent with the prerogative as being consistent with usage, the crown cannot create judges in a different way from the old mode. The chief justice of the King's Bench is created by writ, and cannot be created by patent. All the other judges, the chief baron of the Exchequer, and the chief justice of the Common Pleas, are created by patent; and the crown cannot create the other judges by writ, just as the crown could not appoint an utter barrister a judge, but must appoint a serjeant at law; so a serjeant could not be created by patent, the usual course and usage from time immemorial having been to create serjeants by writ. The whole of this doctrine is most clearly laid down in 2 *Hawkin's P. C.* chapter 1. "As to the first point, I shall take it for granted that the king, being the supreme magistrate of the kingdom, and entrusted with the whole executive power of the law, no Court whatsoever can have any such jurisdiction, unless it someway or other derive it from the crown. Yet it seems, that the king himself cannot sit in judgment upon any indictment, because he is one of the parties to the suit, and therefore, where it is said in some of our antient histories, that our kings have sometimes sat in person with the justices at the arraignment of great offenders, probably it ought not to be intended that they came as judges, but as spectators only, for the greater solemnity of the proceeding. And it is said by Sir *Edward Coke*, that the king has committed and distributed all his

Mr. Austin.

Court of Chivalry.

Mode of creating judges, not to be varied.

Chief Justice of King's Bench created by writ.

King cannot sit as judge.

(a) 12 Co. Rep. 64.

(b) 2 Inst. 186, 187.

(c) Com. Dig. Courts (A.)

(d) 4 Inst. 125.

Mr. Austin.

Authority of
crown delegated
to courts.

James I. sitting
in the King's
Bench.

power of judicature to several Courts of justice ; and though it may be argued with the highest probability, both from the nature of the thing, and the constant tenor of our antient records and histories since the Conquest, and also from the form of all process in the King's Bench and Chancery, which is always made returnable before the king himself, that in old time our kings in person often determined causes between party and party, proper for those Courts, yet at this day, by the long, constant, and uninterrupted usage of many ages, our kings seem to have delegated their whole judicial power to the judges of their several Courts, which, by the same immemorial usage, have gained a known and stated jurisdiction, regulated by certain and established rules, which our kings themselves cannot alter without an act of parliament. For it seems to be clearly agreed, that the king cannot give any addition of jurisdiction to an antient Court, but that all such Courts must be holden in such manner, and proceed by such rules, and in such cases only, as their known usage has limited and prescribed ; and from hence it followeth, that as the Court of King's Bench cannot be authorized to determine a mere real action between subject and subject, so neither can the Court of Common Pleas to enquire of felony or treason. Nay, it is said by some, that the king is so far restrained by the antient forms in all cases of this nature, that his grant of a judicial office for life, which has been accustomed to be granted only at will, is void. And the law is so jealous of any kind of innovation in a matter so highly concerning the safety of the subject, as not to endure any, the least, deviation from the old known stated forms, however immaterial it may seem." [Lord *Brougham*. In the King's Bench, when *James I.* came there, the chief justice made way for him, and put him on the bench ; and I dare say, if any body had moved before His Majesty, he would have been very ready to give judgment. Lord *Wynford*. He sat on the bench, and the judges sat at his feet ; though the judges placed him in that situation, he had not a right to decide.] Upon the occasion to which Lord *Brougham* has referred, a very amusing discussion took

place between His Majesty and the judges (a); the king not at all conceding to Lord *Coke's* suggestion that it was not competent for His Majesty to decide questions of law, "for the king said, that he thought the law was founded upon reason, and that he and others had reason as well as the judges. To which it was answered by me," says Lord *Coke*, "that true it was that God had endowed His Majesty with excellent science and great endowments of nature, but His Majesty was not learned in the laws of His realm of England, and causes which concern the life or inheritance, or goods, or fortunes of His subjects, they are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art, which requires long study and experience, before that a man can attain to the cognizance of it." [Lord *Abinger*. "With which the king was greatly offended, and said that then he should be under the law, which it was treason to affirm, as he said" (b).] Yes, because at the suggestion of the Archbishop of Canterbury, the king thought it was competent to himself to determine the legal rights of private parties. That being an undoubted maxim of law, with reference to the constitution of Courts of justice, it is clear that the effect of this warrant is to interrupt the serjeants in the place they have immemorially occupied in the Common Pleas; and I do not know how it could be said, looking at the history of that body, that they are not constituent parts of that Court. They were so treated in *Paston v. Genney* (c), a case of the greatest importance with reference to the matter now under discussion. In that case, *Bryan*, C. J., speaks of serjeants as being not the ministers but *members* of the Court, "and he says, the Court cannot be *occupied* without them," and there is this remarkable distinction in the language held by the judges in that case, with reference to barristers in general and serjeants at law. The lord chief justice said, "if a serjeant do not do his duty to his client by pleading for him, or misconducts himself against the terms of the statute, he may be estranged, so that he shall

Mr. Austin.

Dispute between *James I.* and Lord *Coke*.

Paston v. Genney.

(a) 12 Co. Rep. 64.

(b) Lord *Coke* adds, "To which I said that *Bracton* saith, quod rex non debet esse sub homine, sed sub Deo et lege."

(c) *Ante*, 39; *post*, 132.

Mr. Austin.

not plead," he says, that the Court cannot make him not a serjeant, that power is disclaimed, but that he may be estranged. [Lord *Abinger*. They may forejudge him, and put him out of Court.] I dare not quite assent to that proposition. I do not know that the words are equivalent to that; but what was said was of a serjeant not pleading in the Court of King's Bench, where the serjeant pleads with the same rights as other counsel, the judges of the King's Bench held, that if a serjeant did not do his duty in that Court for his client, they would forejudge him; and in the end of that case it is said, that if an apprentice (*a*) offend against the statute, he shall not be forejudged, but he shall be ousted del bar; I am quoting this case, and the language of the judges upon that antient occasion, to shew the light in which the serjeants sit in the Common Pleas.

Serjeants,
members of the
Court.

It is not, however, simply that I conceive that the order of serjeants occupies a different position in the Common Pleas from the position occupied by barristers in the other Courts, because it is impossible to contend that the serjeants are not members of the Court itself, and that the Court cannot, without infringing maxims of law laid down in those books which have been quoted, interfere with the privileges of members of that Court. It may be true that the main object of the statutes of *Edward II.*, *Edward III.*, and *Richard II.*, prohibiting the crown from sending letters signed by the Privy Signet or Privy Seal to the Courts of justice, was to prevent the undue interference of the crown in the litigation of private suits; but the language of those statutes, and the mischief, apply, as distinctly, to the case of the crown sending a missive to any of the Courts for any purpose. The statutes were so construed, in a case cited by the lord chief justice from *Anderson* (*b*). By 2 *Edw. II.* cap. 8, it is quite established, that the justices shall not on account of any letter from the king, cease to do right. [Lord *Wynford*. I think there is something in the oath when a man is made a judge, that he will not attend to any letter from the king.] That oath is provided in the next statute, which is one of those statutes which were periodically made and periodically broken, and which

Letters under
Privy Seal.

Judges' oath.

(*a*) Appendix, No. I, XIII.

(*b*) *Cavendish's case*, 1 And. 152.

were only established by long usage. The 18 *Edw. III.* Mr. Austin.
 stat. 4, contains the oath of the judges, "and that ye Judges' oath.
 deny to no man common right, by the king's letters, nor
 none other man's, nor for none other cause, and in case any
 letters come to you contrary to the law, that ye do nothing
 by such letters, but certify the king thereof, and proceed
 to execute the law notwithstanding the same letters (a)."
 That statute, I presume, was broken so early, as to render Letters under
Privy Seal.
 it necessary to enact another in the 20th of *Edward III.*, to
 require (b) that the justices shall do right to all persons,
 without regard to letters under the great or under the
 petty seal. Then comes the last of the statutes of this
 description. In the 11 *Richard II.* cap. 10, the law is
 laid down more distinctly, and seems finally to have pre-
 vailed, it is "That letters of the signet, or of the king's
 privy seal, shall not from henceforth be sent in damage or
 prejudice of the realm, nor in disturbance of the law."
 There it is found in its most general form. In the case in Cavendish's
case.
Anderson (c), reported at much greater length in *Petty's*
Jus Parliamentarium (d), Queen *Elizabeth* had by false sug-
 gestion created a new office in the Common Pleas. The
 judges of the Court refused to admit the patentee to exe-
 cute the duties of the office; whereupon Her Majesty sent
 a first, and a second letter, under her privy seal, to the
 judges of the Court, commanding them to admit the
 patentee; and the judges held that that was in violation of
 those statutes, for they said, that Her Majesty was not so
 to interfere, to the disturbance of the law, and to the dis-
 turbance of common right. That must apply to the
 case where the crown affects, by its prerogative, to interfere
 with the order, course of proceeding, and rules of the
 Court; because they are just as much law, as what may be
 called the substantive law of the land. Some of the more
 important of these subsist by force of usage; some less
 important are made from time to time by the judges under
 the qualified power possessed by them of regulating the
 proceedings of their courts. In *Lane's* case (e), the point

(a) It will be seen Appendix, No. XXIX, that this clause is mistranslated.

(b) 20 *Edw. III.* c. 1.

(c) 1 *And.* 152.

(d) Page 68.

(e) 2 *Co. Rep.* 16 b.

Mr. Austin. was, whether the Exchequer, by the common course of the Court, could make certain leases under the seal of the Court. It was adjudged, that the lease under that seal was good, though it would not have been good under the seal of the other Courts, "and that, by the common usage of the Court of Exchequer, for," says Lord *Coke*, "the customs and courses of each of the courts of the king are as the law, and the common law from the universality of it takes notice of them, and it is not necessary to allege in pleading any usage or prescription to guarantee them, and it is holden in the Year Books (*a*), that the course of a Court makes a law, and it is holden that every Court of Westminster ought to take notice of the customs of other Courts." Almost all the authorities on the subject are referred to in *Lane's case* (*b*), and in the marginal notes to that case, so that there can be no doubt, (indeed it hardly wants authority to establish such a proposition,) that the course of a Court is the law of the Court, and is part, therefore, of the common law. If it should be denied, that the serjeants at law occupy their place by any of these titles, it cannot be denied, that the serjeants have occupied their places in the Common Pleas by the course of proceeding in that Court. They must either have that right by antient usage, or as members of the Court, or as officers of the Court, or they must occupy their places by the course and usage of the Court. If this be true, then no rule of the Court, however minute, can be altered by the king's letter. The Court of Queen's Bench has confined the privilege of moving for a criminal information, to counsel, and they do not allow the party himself to make such motion (*c*). That is a rule of the Court in a very small matter; but that rule, however insignificant, could not be set aside, or interfered with, by any order of the king. In this case, by an order of the crown, there has been

Cursus Scaccarii.

Lane's case.

Course of court,
law of court.

(*a*) Case of Information in Rem, Longo Quinto, 1; Case of Error assigned on practice of Common Pleas, Appendix No. XX.

(*b*) 2 Co. Rep. 16 b.

(*c*) See *Rex* on the prosecution of *H. Hunt v. Justices of Lancashire*, 1 Chit. Rep. 602; *Rex v. Brice*, ib. 352; *Pitt, ex parte*, 2 Dowl. P. C. 439; *Fenn, ex parte*, ib. 527.

a positive infringement of a rule of the Court of Common Pleas. In *Simson v. Neale* (a), already cited, the question was, whether the plea of nul tiel record was good, as not being under a serjeant's hand. "It was answered by the serjeant for the defendant, that all pleas whatever, except the general issue, ought to be signed by a serjeant, and that it appears by the Year Books, for ages successively, that this plea of nul tiel record was always pleaded by a serjeant at the bar, and cited 19 *Hen. VI.* 79 b, 80 a, and many other cases from the Year Books, and said, that the case cited out of *Cooke's* book (b), is not agreeable to the rule pronounced by the Court in *Upton v. Pullyn*; but the catalogue of pleas inserted by Sir *George Cooke* there seems to be intended to draw practisers into the Common Pleas. But what was chiefly insisted upon, was, that as the plea of a recovery in the Court of King's Bench in this case was pleaded and signed by a serjeant, the same ought to be replied or answered by a serjeant, propter dignitatem; for that no attorney or apprentice can answer a serjeant, or plead any plea in the Court of Common Pleas; and of that opinion was the Court," and the case was disposed of accordingly. That was a rule of practice and part of the course of the Court of Common Pleas. The operation of this warrant is to set aside the rule of the Court. For in *Power v. Izod* (c), which has been also referred to for another purpose (d), the question was made, with respect to the validity of a plea signed, not by a serjeant, but by an utter-barrister. Against the plea it was urged, that though the bar at large are now admitted to practise under this warrant in the Common Pleas, nothing had been done to alter the rule which required the signature of a plea by a serjeant; and the lord chief justice says, that the terms of the warrant are without qualification, and enable an utter-barrister to discharge in that Court every duty of an advocate. So that the point is taken. Here, is an antient rule of this Court, requiring all

Mr. Austin.

Simson v. Neale.

Necessity of
serjeant's
hand to
pleadings.

Power v. Izod.

(a) *Ante*, 58, 59.

(b) *Upton v. Pullyn*, Sir *Geo. Cooke's* Cases of Practice, 41.

(c) 1 Bingham New Cases, 304; S. C. 1 Scott, 119; S. C. per nom. *Power v. Fry*, 3 Dowling P. C. 140.

(d) *Ante*, 15, 59.

Mr. Austin.Warrant re-
quires alteration
of rules of Com-
mon Pleas.*Collier v. Hicks.*Right of attor-
neys to be heard
by justices of
peace (*b*).

pleas to be signed by the hand of a serjeant. Upon the objection being taken, that the rule has not been complied with, the Court rules that the warrant (assuming the warrant to be good,) renders it competent for an utter-barrister to sign those pleas; thereby setting aside the antient rule and course of proceeding of the Court, which (as it is said in the case in *Wilson*) is to be found for ages in the Year Books. But looking at the terms of the warrant itself, I need not have quoted that particular instance, for the warrant itself goes much further. In express terms it requires the chief justice of the Common Pleas and his companions, "to make proper rules and orders of the said Court, and to do what may be necessary to carry this our purpose into effect." Now, it is quite as incompetent for the crown, by its prerogative, to require the judges of any of the antient Courts to make rules, as to require them to set aside or vary them. That passage alone, in the warrant, would be quite sufficient to bring it within the statutes which are still in force, and, on that ground alone, the warrant cannot be sustained.

In *Collier v. Hicks* (*a*), the power of the crown to order Courts to hear, or not to hear, a certain class of advocates, was partially considered, and if I may take the liberty of saying so, not accurately considered on all the points, but accurately considered on this point. About that time, there were several cases before the King's Bench as to the power of magistrates, under certain circumstances, either to exclude the public, or to exclude attorneys. That was an action of "trespass for assaulting the plaintiff," who was an attorney, "and turning him out of a police office: plea, that two of the defendants, being justices of the peace, were assembled in a police office to adjudicate upon an information against *A. B.*, for an offence against a penal statute, and were proceeding to hear and determine the same, when the plaintiff, (being an attorney), entered the police office with the informer, not as his friend or as a spectator, but for the avowed purpose of acting as his at-

(*a*) 2 Barn. & Adol. 663; *post*, 128; and see notes to *Dewdney v. Cooper*, 5 Mann. & Ryl. 324.

(*b*) *Vide post*, 124 n.

torney and advocate touching the information." It was a case in which the justice had full power to hear and finally determine, and the question arose on demurrer, whether or not he had a right to appear as attorney and advocate in that proceeding, the justices before whom the proceeding took place having refused to hear him. [Lord *Wynford*. And committed the assault by turning him out.] Throughout that case, this question is treated as being a question upon the proceeding and practice of the court; and it is necessary to make that observation, because, in the language employed by some of the learned judges, there was, perhaps, a little inaccuracy in dealing with this question. As applicable to the higher Courts, it was not necessary to consider that point. "The question," says Lord *Tenterden*, "raised in this case is, not whether any person has a right to be present on the trial of an information before a magistrate, as long as he conducts himself with decency and propriety; nor whether any one, whether attorney or counsel, or of any other description of persons, may or may not be present and take notes, and quietly give advice to either party; but the question is, whether any one is entitled, without permission of the magistrate, and as a matter of right, to attend and take part in the proceedings as an advocate, by expounding the law and examining the witnesses. This was undoubtedly an open court, and the public had a right to be present as in other courts; but whether *any* persons, and *who*, shall be allowed to take part in the proceedings, must depend on the discretion of the magistrates, who, like other judges, must have the power to regulate the proceedings of their own courts. The superior courts do not allow every person to interfere in their proceedings as an advocate, but confine that privilege to gentlemen admitted to the bar by the members of one of the Inns of Court. They do not allow attorneys to act as advocates, and in one of them, (the Court of Common Pleas,) even all gentlemen of the bar are not allowed to exercise *all* the duties of advocates, but the full privilege of so doing is confined to those who are of the degree of the coif. So, doctors of the civil law are not entitled to act as advocates in the Courts at West-

Mr. Austin.

Judgment of
Lord Tenterden,
in *Collier v.*
Hicks.

Restricted right
of audience in
different courts.

Mr. Austin. minster, although they may do so by special permission of those Courts." I do not find that the case has occurred of a doctor of civil law being heard in the Court of Common Pleas. [*Tindal*, C. J. They have been sent for on a special embassy—a pair of doctors. Lord *Denman*. The Court ask the opinion of persons learned in that particular department, But if that were every day's practice, it would prove nothing against the exclusive right of the serjeants. Lord *Brougham*. The Court of King's Bench used, sometimes, to order the attendance of a couple of doctors, that is, a civilian on a side; but then it was always a matter of special permission, and if the doctor had not happened to be a barrister, he would not move the Court.] That is rather consulting him in the character of juris peritus. [*Campbell*, A. G. I apprehend they appear as advocates. Lord *Brougham*. They argue on each side as advocates. Lord *Cottenham*, C. They are there by special invitation. *Campbell*, A. G. They are called upon pro hac vice.] But they are not called upon as advocates; just as nobody ever heard of any other counsel, than the doctors, appearing in the Court at Doctors' Commons. I was there once *suggesting*, but not appearing as a barrister. [Lord *Wynford*. In the commission which sat upon the subject of the amendment of the law, it was very much discussed, whether, in certain cases, barristers might not be admitted to practise at Doctor's Commons; and none of us, I believe, thought it could be done without an act of parliament(a). Lord *Brougham*. Doctor *Lushington* says, that the civil lawyers never claimed any right(b).] With reference to the remark thrown out by Lord *Wynford*, I should apprehend that his lordship would find, on looking into the subject, that it was quite impossible for the king, or any other authority but parliament, to interfere with that. [Lord *Wynford*. We did look very fully into it,—Lord Chief Justice *Tindal*, Lord *Tenterden*, and some others,—and there was not a doubt in the minds of any of us, that it could not be done but by act of parliament.] Lord *Tenterden* goes on to say, "So at the quarter sessions, the justices usually require

(a) *Ante*, 7, 14, 15, 21, 78.(b) *Vide* Appendix, No. IV.

that gentlemen of the bar only should appear as advocates, but in remote places, where they do not attend, members of the other branch of the profession are permitted to act as advocates." *Collier v. Hicks* is cited for the purpose of putting this question, at all events, upon the footing, that by this warrant the crown has affected to interfere with the course and proceeding of the Court. I now advert to observations made by the learned judges, upon points which did not arise in that case, and which it was not necessary to determine. "Persons not in the legal profession are not allowed to practise as advocates in any of these courts. On the hearing of an information, the magistrates, having the discretionary power to regulate the proceedings of their own courts, may decide who shall appear as advocates, and whether, when the parties are before them, they will hear any one but them. It may be, and is in some cases, very convenient that magistrates should hear counsel or attorneys." Then he goes on to say, that that must be left to their discretion, and then *Littledale, J.*, says, "I am of the same opinion. Every court of justice has the power of regulating its own proceedings. In the superior Courts in Westminster Hall, when barristers attend, they only are permitted to act as advocates. Perhaps, if they did not attend, attorneys might be heard as advocates. There is a difference, even in the superior Courts, in this respect. In the Common Pleas, barristers (counsel) only of a certain rank and degree, are permitted to plead. Here, the right claimed is, for all persons to attend as advocates. The plaintiff, indeed, is an attorney of one of the superior Courts, but he can derive no right from that character to act as an advocate in a proceeding before a magistrate. It seems to me, as magistrates have a right to regulate their own proceedings, they must consequently have authority to decide, whether advocates shall, or shall not, be permitted to plead before them; though, in case of difficulty, it may be desirable and advisable that the liberty should be granted." *Parke, J.* delivered this judgment. "My opinion in this case is not founded, in any degree, on that part of the plea wherein it is alleged that the plaintiff was taking notes of the evidence of a wit-

Mr. Austin.

Collier v. Hicks,
continued.

Judgment of
Littledale, J.

Judgment of
Parke, J.

Mr. Austin.

Judgment of
Parke, J. in
Collier v. Hicks.

Taunton, J.

ness then under examination ; but on the other part, where it is stated, that he was acting and interfering in the proceedings and in the examination, as an attorney or advocate, on behalf of the informer, and that the justices told him it was not their practice to suffer any person so to do, and requested him to desist, but were ready to permit him to remain in the police office as one of the public ; that he asserted his right to be present, and to take part in the proceedings, and to act as such attorney or advocate, on behalf of the informer, and that he did, against the will of the justices, continue in the office, acting and taking a part in the proceedings as such attorney or advocate. I am of opinion, that in point of law, this plea is a good justification. It is undoubtedly so, unless it can be made out that all the king's subjects have a right to attend a Court of this description, not merely to act as professional advisers, but to take part in the proceedings in the examination of witnesses, and to act as an advocate usually does. Now it is impossible to say that *all* the king's subjects have a right to act as professional assistants, in the way in which this plaintiff has claimed to do it, either to the party accusing or accused. All may be present, and either of the parties may have a professional assistant to confer and consult with, but not to interfere with the course of the proceedings. No person has a right to act as an advocate without the leave of the Court, which must, of necessity, have the power of regulating its own proceedings ;" and *Parke, J.* qualifies that expression, which is not so qualified in the former judgments, " in all cases where they are not already regulated *by antient usage*. In the superior Courts, by antient usage, persons of a particular class are allowed to practise as advocates, and they could not lawfully be prevented ; but justices of the peace, who are not bound by such usage, may exercise their discretion, whether they will allow any, and what, persons to act as advocates before them." *Taunton, J.* has an observation to the same effect. [Lord *Denman*. I do not think they have the right to select one advocate for one person, and another advocate for another. That observation, applied to a justice at a police office, cannot be good law. They may

lay down general rules. Lord *Wynford*. I recollect directing a nonsuit in *Essex* : a man brought an action for being turned out of the room, who came to practise there, and the Court refused a rule to set aside the nonsuit.] The way in which *Parke J.*,—and indeed the Court of King's Bench,—Quarter Sessions seem to look at it, is this, that these Courts of Quarter Sessions, all of which are more modern than the Courts of Westminster, have a discretion in the selection of the classes of persons who shall be permitted to attend as advocates ; and they may, if they please, exclude altogether. But it is not said that the Courts of Westminster Hall have the same discretion. On the contrary, the learned judges guard themselves against making such a statement as that, and particularly *Parke J.*, for he says, they have a discretion where they are not restrained by *antient usage*. That is the distinction he takes ; but it is quite sufficient for the present argument, to put it on the lowest ground taken in this case. Might the King, by his mandate, have ordered a justice of the peace, acting under that particular act of parliament, to permit an informer or defendant to appear by attorney or counsel ? That seems to be the legitimate question to ask, upon the conclusion come to by the Court, and that question must, it is conceived, be answered in the negative. [*Vaughan, J.* It does not appear to me, that by that you get out of the main difficulty. Assuming this to be a piece of waste paper, which ought not to have issued, yet supposing the chief justice and the other judges of the Common Pleas to adopt it, and act upon it, and pronounce it a rule, the question is, whether that does or does not make a difference.] If the Common Pleas had pronounced a rule, to the effect that utter-barristers should be admitted to plead in that Court, that would be a grave question to consider ; but that is not the question referred to this Court. [*Campbell, A. G.* I know not whether, if I have the honor to address your lordships, my learned friend will have a right to reply. I have no wish upon that subject, one way or the other ; but lest he should not, I think it right to state, that if called upon to give my opinion, I shall submit, that the serjeants' right to practise exclusively in the Common Pleas, arises from the regula-

Mr. Austin.

Discretion controlled by antient usage.

Line of argument intended to be pursued by Attorney-General.

Mr. Austin.

tions of that Court,—that it was a matter of *practice*, and not of *law*—that therefore, the Court of Common Pleas, proprio vigore, might alter that practice, and that they must be considered to have altered it, and that therefore the Common Pleas has been lawfully opened, even without reference to the validity of the warrant.]

Sir W. W. Follett.

Sir W. W. Follett. I was not aware of the attorney general's taking the course which he states he shall do in answer; and when I addressed your lordships before, I said, that I thought the question propounded was, plainly and unequivocally, in the terms of the reference to the privy council; and that the question that your lordships are now asked is, whether the warrant of the late king was a legal warrant, and a proper exercise of the prerogative; and I stated, that though, on an examination of the authorities, I believed it would be found that the Court of Common Pleas had not the power to make the alteration, that was not the question submitted to the privy council, but that the question was, the validity of the king's warrant; and upon my making the remark, that the judges of the Court of Common Pleas had not the power, or certainly had not assumed to exercise the power, that they had simply obeyed the king's warrant, and that if they had not done so, the practice of the Court would to this day have remained as it was, the lord chief justice said, that the judges of that Court had not themselves made, or intended to make, any alteration, but that they had obeyed the king's warrant, and under that had acted. [Lord Wynford. The Common Pleas have not decided it; if they had, I should conceive that they would have put it in a shape that the highest Court might determine upon it. Lord Cottenham, C. That is not the question for us to consider,—what the Common Pleas have done.] Undoubtedly not. I have not made a remark on that. [Campbell, A. G. Of course it is my duty to submit to any view your lordships may take of this, but the petition of the serjeants is referred by Her Majesty to you. Lord Deaman. "The legality and expediency." Campbell, A. G.

Legality of
warrant, sole
question re-
ferred (a).

(a) *Ans.* 51

Now it seems impossible to suppose what advice your lordships can give, without knowing the present state of affairs; and I hope liberty will be reserved to me,—that the question not only is open, but that it must be decided; and that the question necessarily arises, whether the serjeants hold that exclusive privilege by practice or by law; if they hold it by law, nothing can alter it except an act of parliament; if they hold it by practice, then it may be altered by the Court of Common Pleas, who originally established that practice. Lord *Brougham*. We are not called upon to look through one medium rather than another, but to look at the case in every point of view. I think the attorney general's view of the case goes to the point of law. *Campbell*, A. G. The learned serjeants themselves, in their petition, do, as they have an undoubted right to do, claim this exclusive right *by law*. They say that nothing but an act of parliament can alter it—that is the foundation of their petition to the crown; and how can your lordships dispose of the case without going into that? Lord *Brougham*. You get rid of that, if you shew that it is not by law, but by the practice of the Court. If the attorney general means to argue, that this right is derived from practice, and not from the law, and therefore that His Majesty can interfere, I can understand it; but if he means to say, that the king had no power, and then means to discuss the distinct question, whether the Common Pleas have, or have not the right to interfere with the serjeants, and that it was right for them to exercise it, I do not think that question is submitted to the privy council. [Lord *Brougham*. I do not understand the attorney general to mean any such thing. *Campbell*, A. G. I mean to argue, that the warrant was a letter from the king to the Court of Common Pleas, directing them to do what was necessary; that when the judges of the Common Pleas ordered that warrant to be recorded, they acted upon it;—that they have adopted it, and that they, of their own authority, on a recommendation from the crown, opened the Court, and that the Court is now well opened.] Lord *Brougham*. The question is, the legality of the warrant, which is a mandate from the crown to the Common Pleas, to do a certain thing. If

Sir W. W.
Follett.

Adoption by
Court of Com-
mon Pleas.

Sir W. W.
Follett.

Acts done by
Court in obe-
dience to an
illegal order,
which might
have been done
by Court in
exercise of its
own discretion.

they had no power to do it, the Common Pleas ought to have resisted it.] Suppose the Common Pleas had a right to do it by law, still the power of the crown might be illegally exercised in *ordering* them to do a legal act ; because the question is, whether the crown had power to make the order. [Lord *Denman*. Suppose the Common Pleas had the power to alter this,—it being a matter of regulation,—is it possible to say that the act is illegal, simply because the crown has issued this warrant ?] I did not understand that that was the question submitted to your lordships. [Lord *Brougham*. The crown directs the Common Pleas to do a certain thing. If the Common Pleas has no right to do it, the warrant does not clothe them with any authority ; but if they have the right, then the power of the crown being exercised, you say is illegal. Your argument applies in two lights : first, that though the Common Pleas had a right to do this, it might still be illegal in the crown to *order* them to do that which they had a right to do ; and next, that it would be still more illegal to order them to do that which they had *no* right to do.] We have never discussed the question of the power of the *Court*. It did not appear to be raised here, because the warrant is not an order to the Court of Common Pleas to exercise a *discretion* upon it. [Lord *Brougham*. But the crown's ordering it would not make it lawful. *Tindal*, C. J. The question is, by what title the serjeants have an absolute right to exclusive audience in the Court of Common Pleas. If the attorney general convinces the Court, that *practice*, and that alone, gives the serjeants an exclusive privilege, that is one view of the case. If on the other hand, Sir W. *Follett* shews that it is an *inherent right* in the serjeants, as members of the Court, that is another view of the case. Sir L. *Shadwell*, V. C. The question, I apprehend, is the same as it would have been if this reference had been made the day after the letter was written.] Quite so. [Lord *Wynford*. To decide it now, upon the point thrown out, would be to give the go-by to the question of,—whether the acts of parliament which have been referred to, and the principles of great political importance which have been laid down, are

to be got rid of by a side-wind. Lord *Brougham*. I have felt the difficulty in which we are placed by this reference. We are not now called upon to decide a private right.]

Mr. *Austin*. It may be quite right, and perfectly constitutional and wise, for the Common Pleas to proceed in the manner suggested, should it ever happen, which it never will, that the crown orders the Court to decide a particular cause in a particular manner. In the case of *Cavendish* (a), the Common Pleas acted so, because the Queen persisted in an illegal mandate. Here, all that is suggested is, that there has been an involuntary error, and that it was most wise and respectful to suggest to and petition Her Majesty, that She should, by means of Her privy council, reconsider this question. I find that this view was stated by the lord chief justice of the Common Pleas in the last hearing (b). "It has been thought, as this is a prerogative, exercised by the crown, for the benefit of the public at large, that when doubts are entertained as to the legality of the exercise of that prerogative, the most respectful and best way would be, to apply to the crown itself, and for the crown to be advised whether it had or had not the power to exercise that prerogative." And, surely, it is much wiser, and much better, that this matter should not be tried by a litigious discussion before the Court of Common Pleas, where it might happen, and probably in this case would happen, that the exercise of the prerogative of the crown would be overruled by the Court. [Lord *Brougham*. Why not? I think the most respectful course, for all courts, and for all judges, to take, towards the crown as well as towards the subject, is, to do their duty, and to treat an illegal order as a nullity, if they only do it legally (c), and not to wait till the crown shall revoke the order.] At all events, this is a perfectly new argument. If the Attorney-general had informed us that he intended to raise that point, we should have been prepared to discuss it. [*Campbell*, A. G. I have frequently expressed to the

Mr. *Austin*.

Propriety of
reference to
Privy Council.

(a) *Ante*, 91; *post*, 111.

(b) *Ante*, 16, 17.

(c) See the firm conduct of the judges in resisting an undue exercise of the prerogative, by Queen Elizabeth, in *Cavendish's case*, Petyt, Jus Parl. 205—210.

Mr. Austin.

counsel in this case, and the learned serjeants, my opinion upon the subject in the most explicit manner, which is the opinion that I shall, by and by, have the honor to submit to your lordships. [Lord *Wynford*. There is one question, whether, under the petition referred to us (a), we can *hear* that argument ?] And perhaps, if any determination shall be come to upon that point, in favour of hearing the argument, it will be considered, that that is an entirely new point, which has been totally undiscussed at the bar. [Lord *Denman*. You had better finish your argument ; and then, when the attorney general suggests this, we had better clear the Court, and consider it.] As to the question of expediency, how can that be a question to be discussed at the bar before your lordships ? I do not know, whether I am to understand that the attorney general concedes that, for the reasons already suggested, or for other reasons, this warrant is not legal. [Lord *Brougham*. The attorney general was under the erroneous impression that he had the last word, and that you would not be heard in reply, and therefore, with very great fairness, he gave you notice of the point which it was his intention to urge ; but it is clear, that either Sir *W. Follett*, or you, will be heard in reply.] Then I do not propose to offer any further observations upon that part of my argument. It was somewhat abruptly concluded ; but I have, nevertheless, sufficiently concluded.

Patent defects.

I now proceed to take an exception for defects patent upon the document itself. This warrant purports (b) to have the signature of His late Majesty, in the usual place at the top of the document, and it is addressed to the lord chancellor (c). It has no seal upon it of any description, and it is not countersigned ; and I apprehend, that it is a sufficient objection to this warrant, to shew, that there is no seal and no countersign, or no seal, or no countersign (d). [Lord *Wynford*. Can fifteen persons take precedence under the same warrant ? (e)] That was a matter which suggested itself to my mind. This instrument is two patents in one, or rather fifteen. But I was confining my observation to the first part,

(a) *Ante*, 1—9.

(b) *Ante*, 2.

(c) Lord *Brougham*, by whom it was prepared.

(d) *Ante*, post, 107, 110, 112.

(e) *Ante*, 17, 60.

that which orders the Common Pleas to admit the utter-barristers. In all the books upon this subject, it seems to be taken for granted, that there are three seals; the great seal, the privy seal, and the privy signet; the privy seal being the seal called, in those old acts of parliament which have been referred to, the *petty seal*. In 2d Institute (a), is an account of those seals. Without taking upon myself to say that it is necessary in every case that one of those seals should be affixed, it is quite clear that a document of this description must be countersigned; and that by responsible advisers. [Lord *Brougham*. Your argument is, that nothing can be done by the crown, no documents can issue effectually from the crown, without some seal or countersign.] I would not put it so widely as that, but no grant from the crown; and I say; no warrant; and that would embrace this case. [Lord *Brougham*. If that be so, four times a year there is an inaccuracy, and a very important one, in the authority for sending the judges upon the circuits. All the judges go their circuits under the authority of the sign manual, without being countersigned. Lord *Wynford*. They go by virtue of a commission.] The case to which Lord *Brougham* has referred, is strictly in accordance with the rule. There is first the sign manual, which is a direction for something to be done. Where the sign manual is simply a direction for something to be done, perhaps those ulterior solemnities are not required. That is a direction, for something to be done preparatory to the issuing of the commission under the great seal. [Lord *Wynford*. Immediately after that warrant, the judges proceed to issue precepts to the sheriffs to summon juries; but that is legalized by the commission, and the commission bears date from the first day of the term that precedes.] Because the commission is much more extensive than even the terms would import. [Lord *Brougham*. This is a sign manual without a countersign, as you say, and without seal—for what purpose? To the lord chancellor: to desire him to communicate that to the Common Pleas, in order that the Common Pleas may do something, which it has a right to do, or not to do. That is his authority for making this communication to the Com-

Mr. Austin.

Three royal seals.

Countersign.

Appointment of judges to circuits.

Sign-manual.

Precepts from judges to summon juries.

(a) 2 Inst. 555, 556. And see 4 Inst. 55, 88.

Mr. Austin.

Mandatory form
of warrant of
1834.

mon Pleas. If that Court has no right to do the thing ordered, the thing drops; but that document which the crown issues is complete for its purpose, which is, to communicate a certain mandate to the Court of Common Pleas. Lord *Brougham*. The crown, in the same way, issues an authority to the chancellor, which directs him to put the great seal to the commission. This instrument without countersign or warrant, directs the chancellor to make a communication to the judges of the Common Pleas.] I understand your lordship to put it thus—that this sign manual was a mere direction, for the communication of an order, or for the preparation of a warrant. [Lord *Brougham*. For the communication of an order to the Common Pleas.] The judgment of the Common Pleas was (a), that this was a substantive warrant, *requiring* the Common Pleas to take the step. [Lord *Brougham*. It required the Common Pleas to do something; just as a warrant to the chancellor, requires him to put a seal to the commission.] The words are mandatory. [Lord *Brougham*. So they are mandatory to put the great seal to the commission.] That is a very different case (b). That is a direction for a further act to be done—this is a direction for the principal act; and I shall be able to point out authority for that distinction. The words are, “ We do, therefore, hereby order and direct, that the right of practising, pleading, and audience, in Our Court of Common Pleas, during term time, shall, upon and from the first day of Trinity term, now next ensuing, cease to be exercised exclusively by the serjeants at law, and shall be extended to utter-barristers.” [Lord *Wynford*. Suppose a judge went the circuit upon that warrant, no commission issuing? Lord *Denman*. They could not do that. *Tindal*, C. J. It is simply to say, that the judges have chosen their circuits, and it is brought to the Courts, to see that the name of the right judge is put to each circuit.] It is not the authority for the commission. The commission is not grounded upon that act of the crown, which, I apprehend, is the distinction between that case

(a) *Ante*, 16, 17.

(b) The language addressed by the crown to the chancellor, would necessarily be mandatory. The question is, whether the chancellor should have been required to recommend or to command.

and the present. Comyns's Digest, *Patent* (C. 7.) is to this effect. "If the sign manual be to a grant or warrant, regularly it ought to be countersigned by a principal secretary of state, or by the lords of the treasury," by the lords of the treasury, when it is a grant of money, and by the secretary of state, when it is of this description. "And if it be but a direction for another act, as for letters patent to be made, &c. it is sufficient that it be countersigned." I find that such is the practice to this day, and I should have thought that it might have been the practice, in that case to which Lord *Brougham* has referred. But perhaps the case put by the Court is distinguishable—it is no authority at all. "If it be of itself the principal act, it is countersigned, and also sealed by the signet or privy seal. But where an act of parliament directs, that the King assign securities, &c., by his sign manual, it need not be countersigned." That is a single exception, and does not apply to this case. Therefore, according to this authority, this warrant ought both to have been sealed and countersigned. [Lord *Wynford*. The warrant, giving the attorney and solicitor general precedence over the other counsel(a), is countersigned.] Warrants are countersigned. This is recognized by *Blackstone* (b); and Lord *Coke* says, in the passage referred to (c), that the reason is to prevent surprise. [Lord *Brougham*. And to have a responsible person.] That undoubtedly is a reason; but one reason is, to prevent surprise, that is, to prevent the issuing of a warrant, without consideration, and without full information. The principal case upon the point is *Vernon v. Benson* (d), the case referred to in Comyns's Digest(e); and from the authority in 2 Inst. (f), this warrant ought to have been both sealed and countersigned. Countersigning, is put in the case cited, upon the footing suggested by Lord *Brougham*—that there may be a responsible adviser, whose name may appear upon the document. In that case, a constitutional question is raised, upon the suppression of the sign manual by the secretary of state; to whom it was sent to be countersigned, as the preliminary step to the privy seal being affixed to it. The secretary of state sup-

Mr. Austin.
Countersign.

(a) *Ante*, 6, 19.

(b) 2 Bla. Com. 346, 347.

(c) 2 Inst. 556.

(d) 9 Mod. 47.

(e) *Ante*, 106.

(f) 2 Inst. 555, 556; *ante*, 105.

Mr. Austin.

Vernon v. Benson.

pressed it, and his conduct, the reporter says, was approved by the King (a). This appears to be the only case, in which a sign manual has been held valid without a seal or countersign. In *Vernon v. Benson*, the chief baron says, that where the act of parliament directs that the King may assign securities by his sign manual, it need not be countersigned. That proposition is certainly too wide.

Vernon v. Benson was a case referred by the crown, to the attorney (b) and solicitor general (c). Colonel *Vernon* sold his estate, to raise a regiment in the civil wars, and afterwards served *Charles II.* in his exile. After the King was restored, he granted to Colonel *Vernon* certain lands in Ireland, of the value of 700*l.* per annum; and, in consideration of his giving the King the land on which the fortress of Sheerness then stood, and 7000*l.* in money, the King, by letters patent, granted to him, and to *Rupert Brown*, the honor, manor, and forest of Weedwood, in fee. Before this grant, Colonel *Vernon* was possessed of some of the offices in the forest, for a long term, by virtue of a grant made in trust for him, &c. The grant of this forest being apprehended to be very excessive, a bill was exhibited against Colonel *Vernon* and *Rupert Brown*, and upon a full hearing, before Lord *Jefferies*, C., assisted by the two chief justices and chief baron, it was decreed, that the letters patent should be vacated, "being obtained by a gross imposition on the King, in the value of this forest." Colonel *Vernon* died, and upon the accession of King *William*, it was thought not expedient to rest the right of the crown to this forest, on this decree, and an act of parliament passed, to vest this forest in the crown; nobody appearing, in that session of parliament, to claim any right to the forest, or to the leases in the offices, or to the lands on which the fort of Sheerness was built; the representatives of Colonel *Vernon* being all Roman Catholics, *Rupert Brown* procured a saving of his right to be inserted in the statute, and a clause, that he should be paid what debt was due to him from Colonel *Vernon*, by sale of some timber in the

(a) William III., 9 Mod. 64.

(b) Sir Philip Yorke, afterwards Lord Hardwicke.

(c) Sir Clement Wearg.

forest; and that he should assign over his securities from Colonel *Vernon*, to such person as the King, by his sign manual or privy seal, should appoint." So that the debt was vested in the King; and the assignment was to be made, by order of the King, by privy seal or sign manual. A petition was presented from the representatives of Colonel *Vernon*, who represented the hardship of the case, and insisted that the sign manual, obtained under this act of parliament, was obtained by surprise, and thereupon the Queen (*Anne*) granted a privy seal to one of her officers, to recover this debt for her use. The Queen dying before anything was done, this debt due from Colonel *Vernon*, still remained in the crown, by virtue of the statute; and thereupon the defendant, *Benson*, obtained this sign manual to Sir *John Fryar*, to recover this debt, in trust for *Benson*, and likewise another sign manual, reciting the first, and commanding *Brown*, to deliver to *Fryar*, all the securities he had from Colonel *Vernon*, and to assign them to *Fryar*; which was accordingly done, by an assignment of a judgment of 3500*l.*, in Ireland, which affected his estate." Then the question was referred to the attorney and solicitor general, whether, or not, that assignment had been obtained by surprise. It was argued, on behalf of the *Vernons*, that the sign manual was void, because it "never passed through the offices, as it ought to have done, for there is no copy thereof in the office of the secretary of state, or in the office of the lords of the treasury, and therefore not duly issued; and it would be of dangerous consequence, if the treasure of the crown could be disposed of by a sign manual, without being countersigned by the lords of the treasury, or some other officers, who are, by the laws of the land, to be a guard to the King, that he might not be imposed on by any of his subjects. The defendant's counsel contended that, "admitting that the sign manual was not entered in the secretary's, or any other office, or countersigned by the lords of the treasury, or by a secretary of state, yet it was fairly obtained, and was drawn by the under-secretary of state, and sent by the principal secretary of state (*a*) to the attorney general (*b*), and by him approved,

Mr. Austin.

Vernon v. Benson, continued.

(*a*) The Earl of Sunderland.

(*b*) Sir Edward Northey.

Mr. Austin. and sent back to the secretary's office, and all this done before it was signed by the King ; and that, if the secretary had been so remiss as not to enter a copy of it, his neglect should not be prejudicial to the defendant, who had done all which he ought to do, to obtain this sign manual. In this case, though there was no countersign, there was a privy signet. The counsel for the *Vernons* replied, that it was absolutely necessary, that all signs manual should be countersigned, either by the lords of the treasury or by a secretary of state ; that otherwise, great inconveniences might happen, both to the King and people ; for the King might be abused into extravagant, nay into different grants of the same thing ; and it is for that reason the law appoints, that he should be guarded by such counsel as would obstruct such grants ; for if they should be good, without passing through the usual offices, and without observing those usual ceremonies, it would be a vain thing to keep such offices as a fence to the crown from any impositions." It was argued again, for the defendant, " that this was a good sign manual, for though it might not be good to pass treasure, yet, in this case, it was no more than an appointment, according to the statute, to recover a debt," and upon that ground, the recommendation to the attorney and solicitor general accordingly went, " and doth not rest on the foot of other signs manual, but receives its strength from an act of parliament, by which the right to it is vested in the crown." Now the counsel for the *Vernons* further argued, that this sign manual, being sealed by the privy seal, doth not amount to a countersigning ; for the true reason of countersigning is, not to shew that the grant passed through such an office, but to shew what was done by the minister of state, on behalf of the King, to whom he is accountable for his advice and conduct in the office. At this reference the attorney general said, that he never saw any sign manual but what was *countersigned* by the secretary of state, or the lords of the treasury, but had seen several not *sealed* with the signet or privy seal, and those are the signs manual which are issued by the crown, as directions for doing a further act ; and that is the distinction taken in Comyns's Digest, in Blackstone's Com-

Vernon v. Benson, continued.

mentaries, and in this case. And the attorney general goes on to state, that where the sign manual was only a direction, or a commission to do further acts, as to make out letters-patent, there it is only countersigned, but not sealed; but where it is to be the principal act itself, there it is both sealed and countersigned. That is said by Sir *Philip Yorke* acting in this case judicially; and that appears to be the true doctrine at this day. That great attorney general did not advise the patent to be revoked, because it was plain, that there were no merits in the case upon the ground of surprise, and that it was a direction under that act of parliament, and therefore did not stand upon the ordinary footing of signs-manual. It was not, in that case, a question of prerogative. The King was not acting by the prerogative of his crown, but under the special provisions of an act of parliament, which directed, that the patent should be signed by sign manual, or privy seal. Here, the warrant is clearly the principal act; and therefore, upon the authority of these cases, and upon the authority of practice (which may be ascertained by inquiry in the proper quarter), this sign manual ought to have been, at all events, countersigned, and strictly, both countersigned and sealed. My Lord *Brougham* made a reference to the letter which is issued by the crown, raising the son of a peer to bear the rank of his father in his lifetime(a). In that case, the warrants are under the sign manual, countersigned, and registered at the secretary of state's office. So also, a mere warrant to change a name is also signed and countersigned, and registered at the secretary of state's office. So is the licence for a king's counsel to plead against the crown(c). A case, substantially in point upon this subject, is that of *Cavendish*, whom Queen *Elizabeth* wanted to put into an office newly erected(b). This office had been conferred on Lord *Cavendish* by patent, and the judges demurred; upon which, *Cavendish* procured a letter to the judges, under the sign manual and signet. This is an instance of the crown directly sending a communication to the judges of the Common Pleas; and in that case, the communication was under sign manual and the privy seal,

(a) *Ante*, 18. (b) *Petyt's Jus Parliam.* 203; *ante*, 91, 103. (c) *Post*, 141.

Mr. Austin. wherein taking notice that they had not complied, she commands them, that they should comply with that warrant; and the judges not complying with that warrant, the Queen sent another, which was delivered to the judges by the lord chancellor, and which was also under the signet and the sign manual. These are all the authorities which I have been able to find upon this subject; but I apprehend, that if inquiries are made, the practice will be found to be as I have stated it; and certainly, in conformity with the authorities and the practice, the proper course would have been, to have had this document both countersigned and sealed. Upon a former occasion, another document, of this description, was transmitted to the Common Pleas, as to the order of precedence of the attorney and solicitor general (*a*). That document does not appear to have been sealed, but it was countersigned (*b*) by Lord *Sidmouth*. It was a document under the sign manual, addressed to the lord chancellor, and bearing the countersign at the bottom; and in the point of view suggested by Lord *Brougham*, if that required to be countersigned, it is of far greater importance that the present warrant should be so. The recital in that document is this:—“ We, considering the weighty and important affairs in which Our attorney and solicitor general are employed, and on which the attorney and solicitor general of Us, Our heirs and successors, may hereafter be employed,” do hereby order and direct them to have such and such precedence. That was the statement of a fact which was indisputable, which constitutionally required no one to be responsible for it. Now what is the recital in the present document? “ Whereas it hath been represented to Us;” it does not appear by whom it had been represented; “ that it would tend to the general despatch of the business, now pending in Our several courts of common law, at Westminster, if the right of counsel to practise, plead, and be heard, extended equally to all the said courts; but such object cannot be effected, so long as the serjeants at law have the exclusive privilege of practising, pleading and audience, during term time, in

Warrant of 1814.

Recital.

Recital in warrant of 1834.

(*a*) *Ante*, 6, 19; *post*, 114. (*b*) *Ante*, 18, 107, 110.

the Court of Common Pleas." Those are very important suggestions of facts, which clearly admit of great controversy—facts which have been under controversy—but at the bottom of this document there is no responsible adviser; there is no party who can be fixed upon as having made that representation, and given that advice to the Crown. This document, which requires the judges to make certain rules of Court, is not only not sealed, but not countersigned.—[Lord *Wynford*. It does not direct the judges to *examine* into the right—it says: "We do therefore hereby order and direct, that the right of practising, pleading, and audience in Our Court of Common Pleas, during term time, shall, upon and from the first day of Trinity Term now next ensuing, cease to be exercised." The king takes upon *himself* to decide the right.] He does. The document is of this description:—A representation has been made to the crown of certain facts, which we know have long been in controversy. Then the king is made to decide upon those facts, and to order accordingly. This is a document made, not for the purpose of a further one, but as an original and ultimate order. [Lord *Brougham*. And then it requires the Common Pleas, to do what is necessary to carry that order into effect.] In these special words: "to make rules and orders for carrying this purpose into effect." [Sir *L. Shadwell*, V. C. Did the Court do any thing beyond ordering it to be inrolled?] *Tindall*, C. J. We did nothing. We decided the point of practice when it came before us.] Looking upon this matter in a constitutional point of view, as suggested by one of your lordships, we find that a representation is made to the king; that the king is made to act upon the representation; and yet that there is no authority whatever for that representation. Therefore, upon the mere form of the document, without going into other points, this document is void upon the face of it, as it ought to have been countersigned and also sealed, but undoubtedly countersigned. That is in accordance with all the printed authorities, and it is in accordance with the universal practice. The warrant is not sealed or countersigned, nor is it registered in the Secretary of State's office, nor is it gazetted. It has received no one

Mr. Austin.

Examination by the judges, but decision by the King.

Warrant of 1834 unconstitutional.

Mr. Austin. of those sanctions, and in that respect it differs from the order in 1814 (a). Upon this ground, therefore, I submit that the warrant is illegal, and cannot be sustained. The warrant is defective in substance and form,—in substance, because it affects to interfere with immemorial rights, which neither the Crown, nor the Court, nor any other body, can interfere with, but the Court of Parliament; upon which ground I principally rest this case, feeling it to be an all-sufficient ground for the purpose of disposing of it, and because it affects to interfere with the constitution and the proceedings of one of the king's antient courts of justice: in form, because it is not sealed or countersigned by any responsible adviser.

For these reasons, without anticipating what may be urged on the other side, I do humbly submit that your lordships will advise the crown, that the issuing of this warrant was an excess of the royal prerogative.

*Mr. Attorney
General.*
Reference to
the Privy Coun-
cil extra-judi-
cial.

Mr. Attorney General. — I have the honour to be called upon, by your lordships, to attend upon this occasion, and I will express the opinion I have formed, with the greatest candour and sincerity. I begin, by requesting your lordships to consider, whether this is a case upon which you will give any advice to the crown whatever. Does this come within the act of parliament, by which the judicial committee of the privy council was established? By 3 & 4 Will. IV. c. 41, (b) any matter may be referred, by the crown, for the opinion and advice of the judicial committee; but there must be some reasonable limitation in practice. Questions might be submitted to this Court, which your lordships most undoubtedly would refuse to entertain, which would not be for the public good to entertain. There is this limit to questions that are to be submitted to the judicial committee of the privy council. One class of cases, upon which you have a judicial power, and with respect to which your judgment is binding, consists of appeals from the Colonial Courts (c), appeals from the Ecclesiastical Courts (d), and appeals from the Court of

(a) *Ante*, 6 n., 19.

(c) S. 2.

(b) S. 4.

(d) 2 & 3 W. 4, c. 92.

Admiralty (a). Another class of cases may be referred to your lordships, by the crown, where, for the assistance of the crown, in administering the executive government, your advice on matters of law may be material. A recent instance of that occurred in a question that arose respecting the slaves in the Mauritius. It was important for the executive government, to know what directions ought to be given to the governor of the Mauritius, and a reference was made to this Court, to say, whether, on account of certain defects in the registration of those slaves, they were still in a state of apprenticeship, or were entitled to their freedom. Your lordships were of opinion, that notwithstanding the alleged irregularities, they were in a state of apprenticeship. It was of great importance to the crown, to have that advice; and upon the advice given, instructions were sent to the governor to treat them as apprentices. But your lordships have no judicial power respecting who shall practise in the Common Pleas. Suppose your lordships were to declare that this order was invalid, and that the Court of Common Pleas still belongs exclusively to the serjeants; no one would consider himself bound by that declaration. I should go the following day to the Court of Common Pleas—I should present myself to the Chief Justice of that Court, and if he, with the consent of his companions, called upon me to move, as I suppose he would do, I should proceed as if no such declaration had been made. Therefore, I cannot see upon what ground the Court of Common Pleas referred this to the opinion of your lordships; it is wholly extra-judicial.

*Mr. Attorney
General.*

Mauritius case.

The next consideration is, whether the reference of this question to your lordships is not unconstitutional. It is a question that must come for judicial determination. It is a case in which private rights are concerned; those of the serjeants on one side, and those of the apprentices (b) on the other. It will arise either in the shape of a motion to the Court of Common Pleas, that none, except serjeants, shall be allowed to practise there, or in the shape of an action for intrusion. It seems to me, that the learned serjeants have

Reference to
Privy Council
unconstitu-
tional.

(a) *Ibid.*

(b) *Ante*, 11, 32, 45, 49, Appendix, No. I, XIII.

*Mr. Attorney
General.*

Intended appli-
cation to the
Common Pleas.

mistaken their course altogether. Mr. Serjeant Taddy, the king's antient serjeant, gave notice that he meant to bring this matter before the Court of Common Pleas. That is the course he ought to have pursued. That Court might have been called upon to give an opinion, as to the legality of the order, or as to the legality of anything that has been done since the order was pronounced. Such a proceeding was competent to him, or to any of his learned brethren. It might appear in the form of an action. If I go into the Court, and make a motion, either the learned serjeants, jointly as a body, or any one of them separately, may bring an action against me, alleging that I am an apprentice of the law, that I went into the Common Pleas, and that the Chief Justice, with the assent of his brethren, called upon me to move. [*Tindal*, C. J. Put the other case, that they did not call upon you to move.] Then I might present myself, and lay claim to my privilege as an apprentice (a), to move in that Court; and then your lordship would probably not refuse to hear what I had to say; but if your lordship were to tell me, that you and your brethren had come to this conclusion, that serjeants, and serjeants alone, should be allowed to practise, then I should most respectfully make my bow and retire; and I should rejoice in such a determination, because I apprehend that it is a matter entirely in the breast of the judges—it is for the regulation of the judges—it is a matter not of law, but of practice. Suppose an action is brought, and I plead—and that the replication to my plea was, the authority of the judicial committee of the privy council, I should rejoin that the opinion was wholly extra-judicial; and, I apprehend, that no attention whatever would be paid to it (b). Suppose that an action is brought, a plea is pleaded, and there is a demurrer—why it may be carried before any other Court, it may be carried to the House of Lords. [Lord *Wynford*. In what shape would you put it on the record?] According to the well-known case of *Tonbridge*

(a) Appendix, I, XIII.

(b) Whether the opinion of the privy council were extrajudicial or not, a defendant might demur to such a replication. Even the judicial decision of a competent tribunal, is binding only between parties and privies, except where the proceeding is *in rem*.

Wells (a), the serjeants may all join in bringing an action, alleging that they have the exclusive right of common over this portion of Westminster Hall, and a stranger has intruded. Such an action may be brought in any Court of Westminster Hall—it may be carried before the Exchequer Chamber, and before the House of Lords, and therefore it is not for this Court, the judicial committee of the privy council, extra-judicially, and unconstitutionally, to give any opinion upon such a question. It is not suggested what is to be done by Her Majesty. Is the queen to write a letter to the present chancellor, requesting him to inform the present judges of the Common Pleas that the former letter was wholly illegal, and that she wishes that the Court should again be closed, and that the serjeants alone should have the privilege of audience? The order is either valid, or invalid. If it be invalid, it is a nullity; and to be treated as a nullity, in the Common Pleas, and all the world over. Whatever is done under colour of prerogative, in excess of law, is absolutely null. Then, what is the use of your lordships giving an opinion that it is a nullity? But if it be valid, it has conferred important rights upon the apprentices, whose rights are not to be treated with disregard, any more than those of the serjeants. It is stated, as one reason why the serjeants have delayed so long, that they have waited till there was a demise of the crown. But if this be a valid order, it binds the successor of *William IV.*, just as much as *William IV.* himself. If it was invalid, then it was not binding upon *William IV.*, it is not binding upon the present queen, it is not binding upon anybody, it is to be considered as a nullity. Therefore, as it has not been suggested what advice your lordships are to give; or what is to be done, upon your advice being received by the queen that it is invalid; considering that this is not a case coming within the jurisdiction of this High Court,—it is submitted, that your lordships will respectfully decline giving any advice to the crown, whatever, upon the subject. There may be a patent by the crown, and a *scire*

*Mr. Attorney
General.*

No course suggested by the petitioners.

Demise of the crown.

(a) *Willes v. Baker*, 2 Wilson, 414. In *Westbury v. Powell*, cited Co. Litt. 56, where all the inhabitants of Southwark had a customary watering-place for their cattle, it was held that any inhabitant might have an action for stopping it up, such a nuisance not being presentable in the leet.

Mr. Attorney
General.

Scire facias to
repeal letters
patent.

facias to revoke that patent. [Lord Brougham. Can the crown grant a *scire facias* to revoke letters patent, however illegal those letters patent may be, without the sentence of a Court (a)?] Where there is a *scire facias* to repeal a patent it proceeds judicially. [Lord Brougham. The crown could not say, in the *scire facias*, "We have been deceived in a certain grant, and we repeal the same." Suppose the crown has granted letters patent, however illegal they may be, the crown cannot, *mero motu*, without the judgment of a Court, issue a *scire facias*.] A *scire facias* is not a thing that can be claimed as of right (b). It requires the fiat of the attorney general; but upon any reasonable ground laid before the attorney general, he would be guilty of great malversation of his office, if he refused his fiat. A *scire facias* issues returnable in the Queen's Bench (c), and that Court has as much jurisdiction over that process, as where an action is brought upon a *capias ad respondendum*, or writ of summons; and there the judges superintend the proceedings of that *scire facias*, and give judgment that the patent be repealed. [Lord Brougham. And the patent stands, till the judgment.] It does. This proceeding, therefore, bears no analogy whatever to a proceeding by *scire facias*; because, after your lordships may have declared this warrant illegal, the warrant remains just as much in force as it did before, and it neither has acquired any new validity, nor is its illegality in any way established. [Lord Brougham. Suppose the

(a) Every *scire facias* is a writ by which warning or notice is given to the party against whom it issues, (hence called the *garnishee*, i. e. the party warned,) inviting him to shew cause why something should not be judicially awarded against him, in respect of some matter of record, which is in the Court from which the *scire facias* issues, (and which he is presumed to be interested in resisting,) if he shall think proper to do so, *si sibi viderit expedire*. A *scire facias* upon letters patent, is a proceeding on the part of the crown for the purpose of obtaining the sentence of a Court upon the validity or invalidity of letters patent; and it calls upon the defendant, or garnishee, to shew cause, why the letters patent should not be repealed. *Vide* Comyns's Digest, title Patent, (F. 1, &c.)

(b) I. e. a *scire facias* to repeal letters patent, which purports to be a proceeding instituted for the benefit of the crown, and which therefore, even when prosecuted by private individuals, is under the control of the officers of the crown.

(c) *Scire facias* to repeal letters patent may also be returnable in Chancery. *Vide* Comyns's Digest, title Chancery (C 1), Patent (F 6).

crown granted a patent for the making of bread; that would be treated, by the parties against whom it operated, as a nullity, without risk of its being enforced. But if the crown were minded to repeal that, or anybody else wished to have it repealed, as an illegal patent, that would be done by a *scire facias*. It stands as a legal patent, till the judgment upon the *scire facias* is pronounced (a). I do not understand you, as arguing at all that a *scire facias* could apply here (b); but you say, that, just as any illegal title is to stand till the judgment of a Court repeals it, and it cannot be repealed by the crown itself, so in like manner, this warrant must stand till something is done.] I say, that there is no analogy to support this application, and therefore I trust your lordships will decline giving any opinion upon the subject. But if you are to give any opinion or advice to Her Majesty, I apprehend it will be this, that the matter rests entirely with the judges of the Common Pleas, who have the power to regulate who shall practise in the Court. I own, that I feel very great difficulty in saying that this warrant is binding, and can be supported. As I am called upon to give my opinion to your lordships, I am bound to state fairly the opinion to which I have come, and it is this,—that this was not binding upon the Court of Common Pleas, that the chief justice and the other judges of the Court were not at all bound to act upon it. I have considered the question very anxiously, and I own that I do not find any principle, authority, or precedent, that can support this warrant as an obligatory instrument. John de Mettingham's case (c) certainly will not support such an exercise of the prerogative, because, whatever he did, was under an ordinance, or act of parliament,—he was required to provide apprentices and attorneys in every county in England, and that proceeding seems to bear no analogy to that which your lordships are

Mr. Attorney
General.

Warrant of 1834
incapable of be-
ing supported.

John de Met-
tingham's case.

(a) If a patent be void in itself, non concessit may be pleaded without a *scire facias* to repeal it. 2 Roll. Abr. 191; Com. Dig. *Patent*, (F.); 2 Wms. Saund. 72 (O); 17 Vin. Abr. 115.

(b) Qu. The effect of the enrolment of the warrant (*ante* 113, *post*, 121), in so far making it a record as that a *scire facias* may be sued out from it either by the crown or by parties aggrieved.

(c) *Ante*, 45.

*Mr. Attorney
General.*

Court of Com-
mon Pleas not
bound to obey
warrant of 1834.

Merely a re-
commendation
to the Court.

Rule of Court.

discussing. What was laid down by Mr. *Austin*, I feel does not admit of any answer, which is, that the serjeants either hold their exclusive privilege by law, which cannot be altered except by an act of parliament; or by a rule of Court; that is, either by the course of the Court, or it must be supposed to be established by a rule of Court; and if that be so, there seems great difficulty in saying that the crown could alter a rule of Court, any more than that the crown could alter that which was established by an act of parliament. Without, therefore, entering into the question as to the informality of this instrument, in not being sealed or countersigned, there seems to me to be very great difficulty in saying that the Court of Common Pleas would be bound to obey it. It has been suggested, that as the crown may regulate the precedence of gentlemen of the bar, the crown might issue such a warrant as this. But, I own, I see a great distinction between regulating the precedence between individuals of a class, and saying, that one class shall be excluded, and another class shall be admitted. It seems to me, that it can only be by the authority of the Court—that either a new class can be admitted, or those who before had a right to practise at the bar of the Court, can be excluded. But I do not apprehend, that this instrument was ever intended to operate as an order that should be binding upon the Court.—The King uses the language, that generally comes from the crown when issuing an order (*a*). But upon looking at the whole of this instrument, it would appear to be meant as a recommendation, which the judges might have adopted, or which they might have declined to adopt. The language of the order is, “requiring them to make proper rules and orders of the said Court, and to do whatever may be necessary to carry this purpose into effect.” Those who framed this order, therefore, contemplated that something was to be done by the Court. It was not to be done by mere virtue of the prerogative, but rules and regulations of the Court were to be made, and the Court was to do what was “necessary to carry this purpose into effect.” Upon this the Court made this order—“That it be entered

(*a*) E. g. as in proclamations.

of record (a);” the meaning of which was, that the recommendation was acquiesced in. It was making it a rule of Court. When the judges of the Common Pleas ordered this warrant to be entered upon record, it was the same as if they had made an order in these words, directing that “the right of practising, pleading, and audience in the Court of Common Pleas during term time, shall upon and from the first day of Trinity term now next ensuing, cease to be exercised exclusively by the serjeants at law, and that upon and from that day, the king’s counsel learned in the law, and all other barristers at law, shall and may, according to their respective rank and seniority, have and exercise equal right and privilege of practising, pleading, and audience in the Court of Common Pleas at Westminster with the serjeants at law.” It is the same as if the regular rule of Court had been made in the terms of the warrant. It has been acted upon, from the first day of Trinity term, 1834, down to the last day of Hilary term, 1839. That order has been acted upon, by the Court of Common Pleas. [Lord *Wynford*. It was acted upon, as an order of the crown.] Not merely as an order of the crown. If the Court had the power to make an order in the terms of the warrant, and has adopted that warrant, and acted upon it, it follows that they, *proprio vigore*, have made a valid order, and that all that has been done is perfectly legal and justifiable. It therefore resolves itself into this, whether the serjeants had an exclusive privilege of practising in Common Pleas, by a law requiring an act of parliament to alter it; or whether they had this privilege, merely by the course of practice of the Court, to be altered by the Court at its discretion. The serjeants allege, that their prescriptive privilege cannot be abrogated by any authority but that of an act of parliament. That is the very foundation of their petition, and if they can make out this, all that has been done is illegal; the warrant is illegal; and the order of the Court under that warrant must likewise be illegal. But unless the position can be maintained, that the prescriptive privilege of the serjeants at law cannot

*Mr. Attorney
General.*

Adoption of the
warrant by the
Court.

(a) 10 Bingh. 571, and see Appendix.

*Mr. Attorney
General.*

Privilege of
serjeants,
founded upon
regulation of
Court.

Antiquity of
Common Pleas.

Antiquity of
serjeants.

Apprentice sent
into Common
Pleas.

be abrogated by any authority but that of an act of parliament, I apprehend the advice that your lordships will give to the crown will be, that there is no occasion for anything more to be done, and that what has been done is lawful and justifiable. Now I submit, that the serjeants held this exclusive privilege merely by the regulation of the Court, and that it is in the power of the Court to change the regulation which the Court has established. [Lord *Wynford*. Can the King's Bench admit any persons they think proper to practise at the bar?] I apprehend, that the judges of the King's Bench, instead of merely calling upon those persons to move, who have been called to the bar by the benchers of the Inns of Court, might establish another regulation if they thought fit; those who have been called to the bar by the Inns of Court may have a *right*, but I apprehend it is not an *exclusive* right; I shall not avoid that question, and I hope I shall give a satisfactory answer. But it is not necessary for me to controvert much of what has been laid down on the other side. Whether the Common Pleas is an immemorial court, or was established within the time of legal memory, taking its origin from Magna Charta, is *vexata quæstio*; but, for the purposes of the argument, it may be admitted to have existed from time immemorial. It may be likewise admitted, that the serjeants have existed from time immemorial. The first mention of serjeants in any parliamentary document, I believe, is in the statute of Westm. 1st (a). But it may very well happen that the order may have existed for centuries before, and even before the conquest. But neither the immemoriality of the Court, nor the immemoriality of the serjeants, makes any progress at all in the argument, that the serjeants are entitled by law to this exclusive privilege. A further concession may be made. As far as my researches go, the serjeants alone have practised in the Court of Common Pleas. The instance that was brought forward, in the reign of Henry VI., (b) where an apprentice went from the Exchequer into the Common Pleas, and asked the opinion of the judges of that Court, does not, I think, break in upon the position, that the serjeants have exclusively practised in the Common

(a) 3 Edward I. c. 29.

(b) Ante, 50.

Pleas. The practice of sending barristers from one Court to ask the opinion of another, has continued to the present time. I myself, after I was called to the bar, happened to be in the Court of Common Pleas (a) at *Nisi Prius*, at Guildhall, in the time of Sir *J. Mansfield*, C. J., when the question arose there, whether a judge ought to take causes out of their turn, for the purpose of meeting what was said to be a fraudulent injunction; and the opinions of the serjeants being divided upon that question, *Mansfield*, C. J., directed me to go into the King's Bench, (a) and ask the opinion of Lord *Ellenborough*; and the bar in the Court of King's Bench, upon that question. I went, as the messenger of the chief justice. I stated the question to Lord *Ellenborough*; Lord *Ellenborough* then consulted Sir *Vicary Gibbs*, and the other practisers then in court, and gave an answer, stating what had been done in the time of Lord *Mansfield*, and what had been done in his own. I carried back that answer to the Court of Common Pleas. The opinion, as given by the Court of King's Bench, was acted upon, and has been so ever since. But allowing the immemoriality of the Court, and that the serjeants are immemorial, and that they alone have immemorially practised there, the question arises, whether it shall be ascribable to act of parliament, or rule of Court? The serjeants say, that it is to be ascribed to an act of parliament, and that, therefore, an act of parliament alone can alter it. If an act of parliament was necessary to give them this exclusive right, such an act is to be presumed; because where there is an ancient usage, it is to be legalized, if it can be legal, and you are to presume whatever is necessary to give it legality. But you will never presume more than is necessary. Where any profit or honor may have arisen by grant, a grant is presumed; where an easement may be created by grant, a grant is presumed, and nothing more than a grant; and, therefore, if a rule of Court will account for the exclusive audience which the serjeants have had, a rule of Court is to be presumed, and the unnecessary presumption of an act of parliament will not be resorted to. Nor can it be doubted, that the Court of Common Pleas

Mr. Attorney General.

Barrister sent from one Court of *Nisi Prius* to another.

Presumption of a parliamentary origin of privilege of serjeants.

(a) Vide ante, 2, 3 n.

*Mr. Attorney
General.*

Cases of peerage
claimed.

Quarter Ses-
sions.

Cornish Ses-
sions.

Oxford City
Sessions.

antiently had the power of saying that lawyers of a certain class, and a certain grade, should alone practise in that Court? It belongs to every court of justice, high or low, to determine who shall be advocates, and who shall represent the suitors in the business that is to be conducted before such tribunal; and they vary, very much, in the rules that they lay down. In the house of lords, not only barristers, not only serjeants are permitted to practise, but agents who are not called to the bar are allowed to practise (a). In a certain peerage case, the case of the claimant was conducted by an attorney; and in cases that frequently occur, particularly with regard to Irish peers making out their pedigree, and shewing their right to vote for the Irish peerage, it much more frequently happens that a solicitor, or a solicitor's clerk, conducts the business, than either serjeants or barristers. [Lord *Wynford*. In those cases there is no speech made.] I beg your lordship's pardon. In the Gardiner peerage, in which there were questions of the greatest difficulty, there was not only a good deal of documentary evidence, but very long arguments delivered at the bar. [*Tindal*, C. J. Were not those by counsel?] By the solicitor that conducted the case. It cannot be doubted, that the house of lords may allow any class of persons to appear at their bar, as advocates, that they think fit. The quarter sessions have a right to admit as advocates whom they please. There are some Courts of quarter sessions which have refused to make an order giving pre-audience to barristers, and where barristers and attorneys have practised promiscuously. [Lord *Brougham*. Did not the Cornish justices refuse to give pre-audience (b) to barristers?]

(a) Not however when the House of Lords is sitting *judicially*, but before committees of inquiry, to whom claims of peerage, privilege, and other matters are referred.

(b) They refused to give *exclusive* audience to barristers.

At the Epiphany Quarter Sessions in January, 1838, for the City of Oxford, held before the editor, as recorder of that city, five gentlemen of the bar appeared in court, having given notice at the preceding sessions of their intention so to do, and of their intention to attend those sessions regularly. The sessions had been held by former recorders at periods at which it would have been inconvenient for barristers to attend; and the prosecution and defence of persons, &c., had been conducted by attorneys. The recorder stated that he thought the barristers were entitled to exclusive audience, and that he would,

They did ; and the Cumberland justices refused it again and again, and at last yielded to the application. In the county of Monmouth, the justices repeatedly refused to make an order to give audience to barristers. I went to those quarters sessions. I renewed the application for the order ; but till I myself appeared and made that application, they refused to give exclusive audience to barristers. There cannot be a doubt, therefore, that the Court of Common Pleas had a clear right to make an order, that serjeants, and serjeants alone, should practise at that bar. [Lord *Abinger*, C. B. The Courts of quarter sessions, in many parts of England, were in the practice of hearing attorneys. Could they say, we will hear any class of persons not being attorneys ?] I apprehend they might. [Lord *Abinger*, C. B. The Court of quarter sessions might say, we will hear anybody. Lord *Brougham*. I apprehend they might, in their discretion, just as the Court of Insolvent Debtors do.] If you appear by attorney, he represents you ; but when you have the assistance of an advocate, you are present, and he supports your cause with his learning, and ingenuity, and zeal. Appearance by attorney is one thing, but admitting advocates to plead the cause of another, is a totally different proceeding ; and I apprehend that every Court may regulate who shall appear as advocates in the practice of the Court. In the Insolvent Debtors' Court, they have regulated who shall be allowed to practise there as agents. [Lord *Wynford*. Is there not a clause in one of the acts authorizing that ?] Not that I am aware of. [Lord *Bosanquet*, J. In the county of Monmouth, it used to be the practice for solicitors to employ other solicitors as advocates to plead for them constantly (a.) That was the great obstacle to the order being made, because those advocates had a very profitable practice (b). But what I submit, is, that

Mr. Attorney
General.

Monmouthshire
Sessions.

Insolvent
Debtors' Court.

Monmouthshire
Sessions.

upon his own responsibility, prevent an attorney from interfering as an advocate whilst any of the counsel were unengaged. The bar however requested the recorder, that instead of proceeding to commit, or to impose a fine, he would take the opinion of the chief justice of the King's Bench, Lord *Denman*. A statement being laid before Lord *Denman*, his lordship decided that the barristers were entitled to *pre-audience*, but not to *exclusive audience*. *Post*, 128, 129.

(a) This is still the course at the Cornish Quarter Sessions and elsewhere.

(b) In Cornwall, it is understood that the fees paid to advocates at the sessions, are larger than those paid to junior barristers at the assizes.

Mr. Attorney
General.

Lord Bacon's
speech in Chan-
cery.

every tribunal, high or low, has, incident to its jurisdiction, a right to determine who shall appear before that tribunal, to advocate the causes of the suitors. This has been carried to very great length, and has not been questioned, because, I apprehend, it cannot be doubted that every Court may regulate these matters, both as to classes, and as to individuals. When Lord *Bacon* received the great seal, and took his place in the Court of Chancery (*a*), he made a long discourse, in which he says, "To help the generality of lawyers, and therein to ease the client, I will constantly observe, that every Tuesday, and other days of orders, after nine o'clock stricken, I will hear the bar until eleven, or half an hour after ten, at the least. And since I am upon this point, whom I will hear, your lordships will give me leave to tell you a fancy." Now he calls it a fancy, but he had no doubt that it was law. "It falleth out, that there be three of us, the king's servants, in great places, that are lawyers by descent—Mr. Attorney (*b*), son of a judge, Mr. Solicitor (*c*), likewise son of a judge, and myself, a chancellor's son (*d*). Now, because the law roots so well in my time, I will water it at the root thus far, as besides these great ones,"—that is, the attorney and solicitor general, who were at that time so great—"I will hear any judge's son before a serjeant." It does not stop there, "and any serjeant's son before a reader (*e*), if there be not many of them." I suppose that is, many of the serjeants. Now here he takes upon himself to do this: He conceived he had a right to call upon the bar in any order in which he thought fit. He had not then forgotten the slight put upon him by Lord *Coke* (*f*) upon one occasion, when he wished to move before a serjeant. Lord *Coke*, perhaps, from some antient grudge between them, said, that the serjeants had a right to move before him, unless he came upon the King's business. But it is now quite clear, that not

(*a*) He was appointed Lord Keeper 3d March, 1616-7; Lord Chancellor, 4th January, 1617-8; removed for corruption, &c., 1st May, 1621.

(*b*) Sir Henry Yelverton, son of Christopher Yelverton, J. of K. B. 1602 3.

(*c*) Thomas Coventry, son of Thomas Coventry, J. of C. P. 1605.

(*d*) Son of Sir *Nicholas Bacon*, made Lord Keeper, 22 December, 1559.

(*e*) Vide Appendix, No. I, XIII.

(*f*) *Ante*, 55.

only the attorney and solicitor general, in private business, have precedence above all serjeants, but that all King's counsel have. How does that arise? It arises, not from any exercise of the prerogative of the crown, as far as their precedence over the serjeants is concerned; it is done by the judges themselves, in the exercise of the power belonging to them, to regulate who shall be advocates before them. [Lord *Wynford*. Are you aware of any order of the Court for that? Is not that from long use?] It must have arisen since the reign of *James I.* (a), because it appears, that attorney general *Bacon* was in a great fury because a serjeant was allowed to move before him. The change could only have taken place by the regulation of the Court. [Lord *Wynford*. Would it be possible, at this time, for the King's Bench or the Common Pleas to say to any barrister, we will give you precedence over every other barrister in the Court?] I think, that upon their own responsibility, they might do it. I will give an example: On the last day of term, the junior barrister is called to move first. [Lord *Indal*, C. J. Was not that by consent? The king's counsel were spoken to first.] Till Lord *Mansfield's* time, it was only upon the last day of term that the poor juniors had an opportunity of making a motion at all (b). [Lord *Abinger*. You do not mean to say, that the Courts are not at all bound to respect the King's patent! The patent to King's counsel, describes who shall take precedence. Can the Court of King's Bench say, we will violate that, by beginning at the bottom, and by calling upon those who are not King's counsel, first?] Where the crown has issued a warrant upon that subject, I take for granted, that all the judges would most respectfully observe the injunctions contained in the warrant. But I apprehend, that it still belongs to the Court, in the exercise of its discretion, to say in what order any person shall be called upon. I am old enough to remember the time when the King's counsel used to say this: "I humbly thank your lordship," when called upon to move. [Lord *Brougham*. I never heard Mr. *Abbott* (c) move before Lord *Ellenbo-*

(a) 3 Bulstrode, 32, ante, 55.

(b) Ante, 25, 26.

(c) The late Lord *Tenterden*.

*Mr. Attorney
General.*

rough without saying, " I humbly thank your lordship," as if it was a matter of grace and favour] (a). It is a proof, amongst others, that it is in the power of the court to say, in what order the bar shall be called upon. In *Collier v. Hicks* (b) will be found, every thing that I contend for. We are now considering, what the power of the Court of Common Pleas was in antient times, and I think it is clear, that then it was considered, that the power of the Court was the same, as in the case of a court that is recently established. Now, in *Collier v. Hicks*, (b) wherever the learned judge speaks of the exclusive power of serjeants, it seems to be considered merely as matter of favour, not as matter of right, enjoyed under irreversible decision. That was an information laid before magistrates; they were the judges, they constituted the court. Lord *Tenterden* says, " This was, undoubtedly, an open court, and the public had a right to be present, as in other courts; but whether any persons, and who, shall be allowed to take part in the proceedings, must depend on the discretion of the magistrates (c); who, like other judges, must have the power to regulate the proceedings of their own courts. The superior courts do not allow every person to interfere in their proceedings as an advocate, but confine that privilege to gentlemen, admitted to the bar by the members of one of the Inns of Court. They do not allow attorneys to act as advocates; and in one of them (the Court of Common Pleas), even all gentlemen of the bar, are not allowed to exercise all the duties of advocates, but the full privilege of so doing, is confined to those who are of the degree of the coif. " So doctors of the civil law are not entitled to act as advocates in the Courts at Westminster; although they may do so, by special permission of those courts. So at the quarter sessions; the justices usually require that gentlemen of the bar only, should appear as advocates; but in some remote places, where they do not attend, members of the other branch of the profession, are permitted to act as advocates. Persons not in the

(a) But Lord *Ellenborough*, when not pleased with this obsequious language, has said, " Don't thank me, Sir. The Court has granted you not favour."

(b) 2 Barn. & Adol. 663.

legal profession, are not allowed to practise as advocates in any of these courts. On the hearing of an information, the magistrates, having the discretionary power to regulate the proceedings of their own Courts, may decide who shall appear as advocates, and whether, when the parties are before them, they will hear any one but them." [Lord *Wynford*. Before magistrates, twenty years ago, there was no regular bar. But they were in a very different situation in the courts above. In the courts above there was a bar, consisting of men called to the rank of barristers at law by the several Inns of Court; and in the Common Pleas, there were men called to the rank of serjeants by the king's writ. That makes the case very different from the magistrates' courts, which were never attended at that time by any barrister, and in which it was absolutely necessary to fix upon some person to be heard.] I am now considering what was to be done in the Common Pleas, before any usage was established, when it was a virgin court. The usage must have had its origin at some time. In *Collier v. Hicks* (a), it is laid down distinctly, that every tribunal has a right to regulate who shall appear as advocates, and practise before that tribunal. *Littledale, J.* says, "Every court of justice has the power of regulating its own proceedings. In the superior courts at Westminster Hall, when barristers attend, they only are permitted to act as advocates. Perhaps, if they did not attend, attorneys might be heard as advocates. There is a difference, even in the superior courts, in this respect. In the Common Pleas, barristers (b) only, of a certain rank and degree, are permitted to plead. Here, the right claimed is, for all persons to attend as advocates. The plaintiff, indeed, is an attorney of one of the superior courts; but he can derive no right, from that character, to act as an advocate in a proceeding before a magistrate. It seems to me, as magistrates have a right to regulate their own proceedings, they must, consequently, have authority to decide what advocates shall, or shall not, be permitted to plead before them." Therefore he, like Lord *Tenterden*, places the apprentices (b), and those who are of the degree of the coif,

*Mr. Attorney
General.*

Information for
penalties.

Judgment of
Littledale J. in
Collier v. Hicks.

(a) *Ante*, 93, 97.

(b) See Appendix, No. I.

Mr. Attorney
General.

Judgment of
Parke, J. in
Collier v. Hicks.

Distinction be-
tween exclusive
right and right
not to be ex-
cluded.

Whether ser-
jeants hold an
office.

exactly upon the same footing ; both depend upon the regulation of the Court. *Parke, J.*, in some expressions used by him, ascribes a certain potency to usage, but that is to the right that persons have to practise, not to any exclusive right, because what he says is this : " No person has a right to act as an advocate, without the leave of the Court, which must, of necessity, have the power of regulating its own proceedings, in all cases where they are not already regulated by antient usage. In the superior Courts, by antient usage, persons of a particular class are allowed to practise as advocates, and they could not lawfully be prevented ; but justices of the peace, who are not bound by such usage, may exercise their discretion, whether they will allow any and what persons, to act as advocates before them." Therefore it comes to this, that the serjeants could not be *excluded* from practising at the bar of the Court of Common Pleas, but it does not say, that the Court has not an undoubted right to *admit* another class of advocates to practise. I will shortly go over the authorities or arguments which have been adduced, to shew that the serjeants have this exclusive right, which can only be altered by act of parliament. Though my learned friends have avoided the question, as to what the Court may do, they have, incidentally, considered that question, because they have argued at very great length, that it is *by law*, that the serjeants are entitled to this exclusive right, and that no rule of Court can deprive them of it. The Court's being immemorial, does not at all advance their case. A great deal has been said about their holding an *office* ; I apprehend they do not hold an office ; it is a *state*, it is a *degree*, it has none of the incidents or qualities of an office. No assise (*a*) will lie for it, and no action can be brought, because no one has an interest. Even if a stranger is allowed to come into the Court of Common Pleas, to practise at that bar, that is not a case where one person usurps the office of another. But if it were an office, how does it belong to the office to have the exclusive right of practising in the Common Pleas ? Why should it belong to that office, to have the exclusive right of practice in that Court, any more than in the King's Bench, or Exchequer ?

(a) *Ante*, 84 ; and see Appendix, No. XXXVII.

Then it is said that the serjeants are made by writ. But how does that shew that they have the exclusive right of practising in the Common Pleas?—They are made by writ (a)—they have certain privileges,—they have the privilege of practising in the Exchequer and King's Bench, and at the bar of the House of Lords—but their being made by writ, and the Court's not having the power of debarring them from practising, does not shew what the amount of their privilege is while they remain at the bar. It is then said that they take an oath, and that a barrister does not. Now that oath is material, because it is suggested, that all the officers of the Common Pleas are to do their duty in that Court exclusively. If that were so, it would be found in the oath of office that they take. But there is nothing of the sort to be found—because the oath administered to them, is (b), that they will faithfully do their duty to all those by whom they are employed. It is not, "you shall give attendance in the Common Pleas," but, "you shall give due attendance," you shall attend to the affairs of your clients, &c. [Lord *Wynford*. The serjeants may try causes. Lord *Brougham*. There are various persons included in the commission of oyer and terminer, and gaol delivery (c), who are not king's counsel, and they take no oath at all.] The serjeants' oath can have no reference to a judicial power exercised by them. I find no functions ascribed to them, except that they were to do their duty to their clients. [Lord *Abinger*. In the courts of the civil law, I believe, when the doctors were not counsel in the cases, they assisted as judges.] When the Court of Delegates existed, the doctors were put in *pro hac vice*, as the crown might put in any one. [Lord *Abinger*. In the courts of civil law, if I understand right, doctors were entitled to practise; and if they were not counsel in the cause, they might assist as judges.] I am not aware of any thing approaching to that, except that in the Court of Delegates they were put in *pro hac vice*. [Lord *Abinger*. Is it not the case, Dr. Lushington, that in the courts of civil law the doctors, who are of a certain standing, if they

Mr. Attorney
General.

Serjeants' writ.

Serjeants' oath.

Doctors of Civil
Law.

(a) *Ante*, 13, 32.

(b) *Ante*, 13, 31.

(c) But the commissions of assise, and of *nisi prius*, are confined to serjeants.

Mr. Attorney
General.

Doctors of Civil
Law.

are not counsel in the cause, can be considered as assessors, assisting the court? Dr. *Lushington*. They form part of the court. There used to be a separate commission. In each case they act as delegates. Lord *Abinger*. I don't mean in the Court of Delegates, but in the Ecclesiastical Courts. Lord *Brougham*. Suppose you are sitting in the Consistory Court, or the Prerogative Court, are you the only judge in that Court, or are all the civilians, not being engaged in the cause, considered as judges? Dr. *Lushington*. Certainly not (a). There is nothing, either in the writ or in the oath to point at any judicial functions to be performed by the serjeants. It was stated by Sir *William Follett*, that the serjeants are assistants in the House of Lords. That is a mistake. The Queen's serjeants are summoned as the attorney and solicitor-general are, but the other serjeants have no functions whatever to perform in the House of Lords. (b) [Lord *Brougham*. King's counsel are not summoned.] No; but Queen's serjeants are summoned, just as the judges are. They have a writ in the same words. Therefore the serjeants have no duties of that sort to perform by virtue of the *coif*. (c) They are merely advocates of higher rank and longer standing than the others. It has been said, that the judges of the Queen's Bench and Common Pleas must be made from among them. That is very true—the judges of the Exchequer need not (d). It is, however, only nominally so; though a person is made a serjeant because he is to be a judge, he is not made a judge because he is a serjeant (e). But the existence of this privilege of the serjeants to have the judges made from among them, would not shew that they have the exclusive right, by law, of practising in the Common Pleas. Nothing said by Fortescue (f), and nothing said by any of the judges in *Paston v. Genney* (g), is at all at variance with the position for which I contend.

(a) Negating the latter alternative, *ut videtur*.

(b) *Sed vide* Appendix, No. XXV.

(c) See Appendix, No. I.

(d) But unless they are serjeants they cannot try issues at *nisi prius*.

(e) Rather, he is made a serjeant to enable him to be a judge, thereby evading, without, in form at least, violating, the rule, which requires judges to be appointed because they are serjeants. *Ante*, 22, 73, 74, n.

(f) *Ante*, 38, 39.

(g) *Ante*, 39, 40, 41, 44, 89.

Fortescue says, "There is not, in any other kingdom or state, any particular degree conferred upon the practisers of the law, as such, unless it be in the kingdom of England; neither does it happen, that in any other country, an advocate enriches himself so much by his practice, as a serjeant at law. None, be he never so well read and practised in the laws, can be made a judge in the Courts of King's Bench or the Common Pleas, which are the supreme ordinary Courts of the kingdom, unless he be first called to be a serjeant at law. Neither is any one besides a serjeant permitted to plead in the Court of Common Pleas, where all real actions are pleaded; wherefore, to this day, no one hath been advanced to the state and degree of a serjeant at law, till he hath been first a student and a barrister (a) full sixteen years." Now, what is the language of Fortescue, supposing him to be quite correct? he says no one is *permitted* to plead at the bar of the Common Pleas, except a serjeant. Then a serjeant practises not by a prescriptive right, but by *permission* of the Court. Barristers are permitted to practise in the King's Bench, serjeants are permitted to practise in the Common Pleas, all resting on regulation as to the practice. But Fortescue is to be received with great reserve, because he states what is evidently incorrect; for he states that no one can (b) be called to the degree of serjeant, till he be of sixteen years standing; and if that had been the controversy submitted to the judicial committee of Her Majesty's privy council, this might just as well have been cited as an authority, to shew, that any call of a serjeant, where the candidate is not of sixteen years' standing, is utterly unlawful (c). There is nothing, therefore, in this passage, to support the doctrine that is contended for on the other side. *Paston v. Genney* is a case certainly requiring great consideration; and it approaches nearer to an authority, that this privilege is enjoyed by prescriptive right, than any thing I meet with in the books. [Here

Mr. Attorney
General.

Paston v. Genney

(a) A mistranslation, see *ante*, 39.

(b) The words are, "hucusque assumptus est," not "assumi potest."

(c) The practice as to length of standing at which students have been called to be serjeants, may have varied from time to time. Possibly, however, it might still be a good return, by a party unwilling to take upon himself the estate and degree of a serjeant, that he had not been a student sixteen years. *Ante*, 39.

Mr. Attorney
General.

Serjeants not
sued by bill, as
officers.

Appointment
to office of
Exigenter.

the Attorney General read *Paston v. Genney* (a) at length.] That seems to me to be the strongest authority that has been brought forward to shew that the exclusive privilege is founded on prescription. But it is by no means sufficient authority, because it merely shews that at that time, the *practice* being that none but serjeants should practise, it was held that none but serjeants should be allowed to practise. It says nothing as to the origin of the practice, as to the right of the practice, as to how it began, or how it is to be continued; and all that we find here is perfectly consistent with the notion of there having been a rule of court, by which the pleading in the Common Pleas was confined to persons of the degree of the coif. Those are the only authorities which seem to have any weight. But this deserves great consideration,—that it has been ultimately determined that a serjeant is not to be sued by bill. Now, if he were an *officer* of the Common Pleas, like the filacer and other officers of the court, he would be entitled to be sued by *bill*, and he must be sued in that court, and if he were sued in any other court, he might plead in abatement—that he was a serjeant, and liable to be sued only in his own Court. It will not be disputed that a serjeant must be sued by writ. There is a case to that effect in Sir George Cooke's Reports, 104 (b). And indeed in Lord Hale's time it was determined, that serjeants had no privilege to be sued exclusively in the Common Pleas (c). This entirely gets rid of the argument, that they are officers of the court,—that they are members of the court. Because, if they were officers of the court, if they were members of the court, they would clearly be entitled to be sued in that court exclusively, and to be sued by bill, as other members (d) of the court are. Some reliance was placed upon the case in Dyer (e), where it was held that the queen could not, in derogation of the authority of the justices of the Common Pleas, appoint to the office of Exigenter of London; the Court, holding that the office was in the disposal of the

(a) Appendix, No. XXXVIII. (b) *Swain v. Girdler*, S. C. Barnes, 371.

(c) *Deakins v. Scroggs*, Appendix, No. XXXIX.

(d) Judges are not sued by bill.

(e) *Skrogges v. Colsehill*, ante, 52.

chief justice. In a trial that took place in the time of Lord Holt, in the King's Bench, there was a dispute whether Lord Holt was entitled to appoint his brother to the office of chief clerk. (a) It is related, that during that trial he descended from the Bench, and he sat upon a chair, instructing his counsel. But that has no application to the question, whether the serjeants had this privilege *by law*, which could only be changed by act of parliament. Then it was said, that an act of parliament was in contemplation in the year 1755. It might be more prudent and more convenient, if all the rights and privileges of the parties are to be settled, that there should be an act of parliament upon the subject. In 1755 it was contemplated, not merely that barristers should be allowed to practise in the Common Pleas, but that the judges might be selected from among the barristers. That could only be done by act of parliament, because, by law, the crown cannot appoint judges to the Common Pleas or King's Bench, except from among the serjeants; and in this very case, in 1834, it was once in contemplation to have it done by act of parliament, either in the Uniformity of Process Bill, or in the bill establishing that most useful tribunal, the Central Criminal Court (b). It was intended that a clause should be introduced, by which this should be done. But, I presume it was thought that it was unnecessary, inasmuch as the Court, upon the recommendation of the crown, had the power to do it, and that legislation, therefore, was not at all required. In *Simson v. Neale* (c) nul tiel record being replied to a sham plea of judgment recovered, the question was, whether the replication must be signed by a serjeant, or not; and it was said, that the replication must be made by a serjeant, and that therefore the party must be put to the expense of having a serjeant's hand to this replication, which replication was a mere matter of course. That was necessary, because it was then the course of practice of the Court, and had been so for a great many years. It cannot be said, that this could not be altered but by an act of parliament. Can it be doubted, that the chief justice of

Mr. Attorney
General.

Lord Holt.

Proposed alteration in 1755.

Pleadings
signed by ser-
jeants.

(a) *Duchess of Grafton v. Holt*, ante, 54, 82. (b) Appendix, No. VI.

(c) *Ante*, 58.

Mr. Attorney
General.

the Common Pleas, with the advice of his brethren, might have said, before the Court was opened, that there was no necessity whatever for a serjeant being met by a serjeant; that, although the plea of judgment recovered, might require a serjeant's hand, a replication of nul tiel record did not require it? But suppose, that in the time of the Aula Regis, or before the Conquest, a rule had been established, that a serjeant must be met by a serjeant; and that, if there were a plea of judgment recovered, with a replication of nul tiel record, a serjeant's hand must be subscribed to it; then here there is an immemorial Court, there are immemorial serjeants, and an immemorial practice of a serjeant being met by a serjeant. Will it be said, that this immemorial practice could not be altered, except by act of parliament? Would not a rule of the Court be quite sufficient for that purpose? Then why should a rule of Court be sufficient to alter that rule of practice, and yet an act of parliament be required to alter the rule of practice, by which serjeants are exclusively heard at the bar. Both are matters of practice, both stand upon the same foundation, and both under the same authority. Reference was made to the practice in the Palace Court (a), and it was asked, — could the Palace Court be thrown open by the Court to all barristers? I say that it could be, and that it is done; because, although there are only four regular barristers who practise there habitually, upon an application to the judge of the Court, they allow any barrister to come and practise there: he must come specially. [Lord *Wynford*. All the barristers are to be employed. Lord *Brougham*. If all the serjeants had been employed in every case, there would not have been this petition.] If all the serjeants were employed in every cause, any barrister might be employed along with them. That would (b), no doubt, be lawful; but this is likewise lawful, which puts them all upon a fair equality. Another objection was made with respect to the Ecclesiastical Courts. When that is examined into, it will be found the strongest illustration of the doctrine for which I contend: wherever the Ecclesiastical Courts can have a class of advocates, who have devoted themselves to the civil law, and are more peculiarly conversant with the questions debated in those Courts,

Palace Court.

Ecclesiastical
Court.

(a) *Ante*, 65.

(b) *Quære*.

and who can give fit assistance to the judge, then an order may be made, for that class to have exclusive audience. But when such a class cannot be expected, then any other class of advocates may be admitted. In the Consistory Court, the practice formerly was to admit barristers to practise. A learned judge, (a), one of your lordships' body, can give you information upon that subject, the present judge of the Court of Admiralty, Lord Mansfield, when at the bar, used frequently to go to Doctors' Commons. He went there specially, the Court giving him leave (b). There being a numerous bar at Doctors' Commons, barristers are not allowed to practise there. But how is it at York? How is it at Exeter? How is it at every other Consistory Court throughout England? No doubt, doctors of civil law would be allowed to practise there, but they have no exclusive right; and barristers are constantly admitted, and barristers almost exclusively practise there. At the Court at York, barristers upon the northern circuit, practise there, although they are not doctors of the civil law, or of the common law. But, though they do now practise there, the Consistory Court, or the Prerogative Court, at York, might make an order, that none but doctors of the civil law should practise there; or, if doctors have practised there exclusively, they might make an order that that exclusive privilege should cease, and that barristers should be allowed to practise there. Every thing, therefore, shews that this is matter of rule and regulation. It is exceedingly improbable, that there should be any such law, that there should be any such act of parliament; because it must resolve itself into an act of parliament. It is not pretended that serjeants are, *at all events*, to be heard, and that none but serjeants are to be heard. It is not disputed, that if by any sudden calamity, they should all be swept away from the face of the earth, then barristers might be heard. It is not disputed, that if they were to *refuse* to plead, then barristers might plead. The law contended for, is not that barristers shall never be allowed to plead, it is not an absolute law. Now, what is the qualification? It would be strange, if barristers, in all cases, should be

Mr. Attorney
General,

Consistory
Courts.

(a) Dr. Lushington.

(b) *Vide ante*, 96.

*Mr. Attorney
General.*

Serjeant Bend-
loes supposed to
be the only Ser-
jeant.

*Paston v.
Genney.*

excluded, and it was not in the discretion of the Court to say who should be admitted, and who not. It may well happen that all the serjeants may be on one side. On one occasion, there was only one serjeant in the Court during the whole term, what was then to be done? Was he, like Mr. Serjeant *Bendloes*, to take his fees from both sides, and then to tell the Court, what would be said for the plaintiff, and what would be said for the defendant? In the preface to 8 Modern Reports, I find this: "In the 10th year of Queen *Elizabeth*, there was but one serjeant at the Common Pleas bar, for a whole term together, and that was Serjeant *Bendloes*; and I do not read that he had any business there (a)." Now, what was to be done in that term when Serjeant *Bendloes* alone practised there? Was the plaintiff to have him, or was the defendant to have him, or was he to be on both sides? Suppose the number of serjeants is reduced to seven or eight, and that they are all on one side; what is then to be done? Is justice to be denied. It is part of the privilege, that a party cannot plead his own cause in the Common Pleas (b). In the King's Bench he may. [*Tindal*, C. J. Parties may plead their own causes.] No doubt, the Court may do whatever is expedient; but I think, in some authorities, particularly in *Paston v. Genney* (c), a distinction is made between the Common Pleas and other Courts. I do not say that such is the modern practice, but that such is the antient claim (c).

(a) This is said, whether truly or falsely, with reference to the quantity of business in the different courts, at a period when Sir *Thomas More*, chancellor, is represented as usually rising at eleven, after reading all the bills which had been exhibited. The passage cited by the attorney general could hardly be intended to convey the idea that in 10 Eliz. there was only one practising serjeant. The tenth year of *Elizabeth* began 17 November, 1567. *Bendloes* was made serjeant, with eight others, in 1554. Two were made in 1555, one in 1556, and one in 1557. In 1558 eleven were called to be serjeants; but as Queen *Mary* died before the writs were returnable, eight of the eleven, and two others, were made in 1559. One was made in 1560, one in 1566, seven in E. T. 9 Eliz. (1567) the year immediately preceding. Out of the serjeants created in 1567, *Wray* and *Manwood* were made judges in 1572, *Gawdy*, in 1574, and *Jeoffries*, in 1576. Yet, according to the construction here put upon the language of the anonymous writer of the preface to 3 Modern Rep. these four, as well as the thirty-three other serjeants, called since 1554, together with all *Bendloes's* seniors had been swept away in 1568. And see Appendix, No. XXVIII. post 167.

(b) Quære where such a privilege was claimed.

(c) *Ante*, 39, 89.

I apprehend, that upon such an emergency as that of the serjeants all being on one side, the Court would have a clear right to admit other counsel there. Then let me put a case: Suppose they were all on one side, except one, and that he, from age and infirmity, might be minus sufficiens, it would be very hard upon the party. The liberty of the subject might be concerned. Suppose it is a case where there is a writ of habeas corpus moved for at the bar of the Common Pleas, and that all, except one serjeant, are engaged in favor of the commitment, it would be an exceedingly hard case. [Lord *Brougham*. And suppose that that serjeant, being a king's serjeant, the crown claimed him (a)?] I suppose a case where the bar is not open. Now, every barrister may practise there, and no hardship can arise. But I put the case of the Court being closed, and all the serjeants, except one, being retained on behalf of the commitment, very great hardship might arise, and the judges might not have that fair assistance which is to be rendered to them by the bar. [Lord *Wynford*. The party may go to another Court.] He may have applied to every other Court, and may come at last to the Common Pleas. If the Court were closed in this manner, by an act of parliament, very great peril might arise to the liberty of the subject. But I presume, there is no such act of parliament,—that it is in the discretion of the learned judges of that Court, as necessity arises, to do what justice requires, and to make such regulations as shall be for the benefit of the suitors in that Court. The judges of the Common Pleas are supposed to join with the other judges, in calling students to the bar. The benchers of the inns of court, are only the agents of the judges in calling to the bar. It is a power committed to them by the judges, a power which the judges may resume. There is an appeal from the opinion of the benchers to the judges. Upon that appeal, the judges of the Common Pleas sit, just as well as the judges of the Exchequer and the King's Bench; and they sit there, because they are supposed

*Mr. Attorney
General.*

Students called
to the bar under
authority of
judges.

(a) King's serjeants cannot plead, or advise, against the crown without a licence; and in the Canadian Prisoners' case, here alluded to, the crown had, as usual, claimed the services of Mr. *Serjeant Wilde*. And see *ante*, 111.

Mr. Attorney
General.

Appeal to the
Judges, upon re-
fusal of benchers,
to admit into
the society, or
to call to the
bar.

Inns of Court.

Roger North's
"Comedy of the
Dumb Day."

to have called the party to the bar. Suppose the Society of Lincoln's Inn; for some insufficient reason, refuse to call a man to the bar, he may appeal to the judges, and now, I am happy to say; that if they should refuse to admit him a member of the society, he may appeal to the judges,—an improvement for which the public is mainly indebted to the solicitor general, with my concurrence. But I put the case of a gentleman who has kept his terms, and done his exercises, and who is a candidate to be called to the bar. The benchers refuse to call him. He appeals to all the judges. The chief justice of the Common Pleas and his brethren sit upon that appeal, just as much as the judges of the King's Bench and Exchequer; because they are supposed to call a person to the bar. If they make an order that he be called to the bar, he is called to the bar by the judges of the Common Pleas. [Lord Abinger. They may equally sit upon the regulations of the benchers, as visitors.] They are not in the nature of visitors. The inns of court are mere voluntary societies. They were originally dining clubs and nothing more, like the clubs established at the west end of the town. The judges deputed to the benchers of the societies the task of giving lectures, and examining into the sufficiency of the candidates, and of calling them to the bar, but they are still mere voluntary societies; and they act by the authority which the judges have delegated to them. When there is an appeal from the decision of the benchers, the judges of the Common Pleas join in sitting upon that appeal; and if the candidate be called to the bar, I say, he is called to the bar by the judges of the Common Pleas. When a person was called to the bar, as the regulation stood before the warrant of 1834, he was not allowed to practise in the Court of Common Pleas in banco, but he was allowed to practise in the other courts in Westminster Hall; and it was competent in the judges, to alter the regulation by which he was excluded from the Common Pleas. I will refer to a case, in which the serjeants themselves were conceived to have been strongly of opinion, that they might be excluded at any time by an order of the Court; and that barristers, and any other class of advocates, might have

been admitted to plead in competition with them, and this brings me to the dumb day. It is described in a passage in Roger North's *Life of the Lord Keeper Guilford*. The language used in relating what then took place, seems to me to be extremely material, because it appears that, upon that occasion the learned serjeants not only were alarmed by the fear that their monopoly was gone, but they seem to have admitted that it was in the power of the Court at any time to destroy their monopoly. Roger North says, (a) "There was an incident that happened not long after his lordship came into the place of chief in that Court, which, though in itself and in the end of it ridiculous, yet being an affront to the Court, and in particular to the lord chief justice, and by the whole bar of serjeants all in a lump together, ought to be related, as I shall do, really as it was acted by them." Then he goes on to state, that there had been an usage to have side bar motions made in the King's Bench, and in the treasury of the Common Pleas (b); which shews that it is in the power of the Courts to regulate how the business shall be conducted. Now, might not the judges of the Common Pleas say, that certain business shall be done by side bar rules, and that those side bar rules shall be moved by apprentices; and might they not say, that other parts of the business shall be done only by those who are of the degree of the coif? Now after mentioning the occasion, and the offence taken, he says:—"However agreeable this kind of practice was to a novice, it was not worthy the observation it had; for once or twice a week was the utmost calculate of these motions. But the serjeants thought that method was, or might be, prejudicial to them who had a monopoly of the bar, and would have no water go by their mill, and supposed it was high time to put a stop to such beginnings, for fear it might grow worse. But the doubt was how they should signify their resentment so as to be effectually remedial. At length they agreed for one day to make no motions at all; and opportunity would fall for shewing the reason how the Court came to have no business. When the Court (on this dumb day as it was called) was sat, the chief

Mr. Attorney
General.

The dumb day.

Side bar motions.

(a) *Life of Lord Keeper Guilford*, vol. i. p. 195.

(b) *Post*, 142 (a)

*Mr. Attorney
General.*

*The dumb day,
continued.*

justice gave the usual sign to the eldest serjeant to move— He bowed and had nothing to move. So the next, and the next, from end to end of the bar. The chief seeing this, said, ‘ Brother, I think we must rise ; here is no business.’ Then an attorney steps forward, and called to a serjeant to make his motion ; and, after that, turned to the Court, and said that he had given the serjeant his fee and instructions over night to move for him, and desired that he might do it. But profound silence still. The chief looked about, and asked what was the matter ? An attorney that stood by, very modestly said, ‘ that he feared the serjeants took it ill that motions were made in the Treasury’ (a).— Then the chief scented the whole matter, and ‘ Brothers,’ said he, ‘ I think a very great affront is offered to us, which we ought, for the dignity of the Court, to resent. But that we may do nothing too suddenly, but take consideration at full leisure and maturely, let us now rise, and to-morrow morning give order as becomes us ; and do you, attorneys, come all here to-morrow, and care shall be taken for your dispatch ; and rather than fail, we will hear you, or your clients, or the barristers at law, or any person that thinks fit to appear in business, that the law may have its course.’ And so the Court rose. This was like thunder to the serjeants, and they fell to quarrelling one with another about being the cause of this great evil, which they had brought upon themselves. For none of them imagined it would have such a turn as this was, that shook what was the palladium of the coif, the sole practice there. In the afternoon they attended the chief and the other judges of the Court ; and in great humility owned the fault and begged pardon, and that no further notice might be taken of it, and they would be careful not to give the like offence for the future. The chief told them that the affront was in public, and in the face of the Court, and they must make their recognitions there next morning, and in such a manner as the greatness of their offence demanded, and then they should hear what the Court

(a) Which appears to have been a piece of nepotism on the part of the Lord Keeper, for the benefit of Mr. Roger North, the dramatist of “ this comedy, called the Dumb-day.”

would say to them," still reserving to the Court the power of saying,—‘ Your monopoly is gone, your palladium is lost, and you are now come in *pari passu* with the apprentices.’ Accordingly they did; that is, they appeared in Court; “and the chief justice first, and then the rest in order, gave them a formal chiding, with acrimony enough; all which, with dejected countenances, they were bound to hear. When this discipline was over”—[Lord *Brougham*. Was there any further discipline?]—All the rest is left to inference. “ When this discipline was over, the chief pointed to one to move, which he did (as they said) more like one crying than speaking, and so ended the comedy, as it was acted in Westminster Hall, called the Dumb Day.” The serjeants took offence at side bar motions being made, which they said was breaking in upon their monopoly, it might go from bad to worse, and therefore they said, “ Let us make a stand at the beginning ;” but they were defeated—they were alarmed —[Lord *Abinger*. There have been many changes of practice since that time.] I cite this for the purpose of shewing that both the serjeants and the judges, at that time of day, seem to have thought that it was clearly in the power of the Court to deprive the serjeants of the exclusive audience they had. [Lord *Wynford*. There is no doubt they thought, at that time, the Court could do any thing.] The judges, with a high hand, say, that they have a right to regulate the practice, and the serjeants make a most humiliating speech. They say that they have erred, and will never do the like again, and that they will submit themselves, for the time to come, to such regulations as the Court may make. Respecting the expediency of this measure, your lordships are able to form a much better judgment than myself; but I will just remind you of the great grievance which was felt before the Court was open, from suitors who had causes at *nisi prius*, conducted by barristers, and who could not have the assistance of those barristers when a new trial came to be moved for, or cause was to be shewn against it. That was a great hardship at the sittings at London and Westminster; but upon the circuit it was still more felt, because it might happen that there was no

Mr. Attorney
General.

The dumb day,
closed.

Motion for new
trials in the
Common Pleas.

*Mr. Attorney
General.*

Exclusion of
conveyancers
from the Com-
mon Pleas.

serjeant at all going the circuit, or it might happen that there was only one serjeant, and then when a new trial came to be moved for in the Common Pleas, new briefs were to be delivered, and the cause could not be so well treated as by counsel who were present at the trial, nor could the Court have the same assistance from the bar, as they would otherwise have had. There is another thing that I might mention, with all due submission and respect for the coif. Sir Vicary Gibbs, when chief justice of the Common Pleas, repeatedly lamented that there was a certain class of cases, that were not so well argued in the Common Pleas as in the King's Bench. He particularly referred to conveyancing questions, where the judges of the King's Bench had the advantage of conveyancers coming in—gentlemen who had devoted their lives to the law of real property, and who could give much more assistance to the bench upon such questions, than those who are spending their lives in making speeches to a jury. In the Common Pleas no such assistance could be obtained; it was a cause of great lamentation for that learned chief justice. I do not presume to say whether the same inconvenience has ever been felt by his successors. At present, I readily allow, that in the Common Pleas there are serjeants who are most deeply learned in every branch of the law, and amply sufficient to do justice to every case that can come before the Court. But the same difficulty may arise at a future period; and without the bar being reduced to that *unity* which subsisted in the time of Serjeant Bendloes, it is possible that the bar may be in such a state as that it may be difficult to obtain the assistance of a gentleman well versed in the law of real property, or in some other branch of the law that may happen to be tried in that Court. I will now point out the great inconvenience that might arise to suitors, if the Court were again suddenly closed. It has been said, that if a man fell down from a window and broke his legs, you would not cure him by tossing him up again; and if it were to be regretted that the Common Pleas has been opened, your lordships would consider what the consequence might be, of suddenly closing it. In a great many causes depending in that Court,

counsel, who are not serjeants, are retained, and have had briefs delivered. Many rules for new trials are depending in the Common Pleas; and if all but serjeants were excluded, considerable inconvenience might be felt.

Mr. Attorney
General.

If the mandate of 1834 is to be treated as a nullity, what is to become of that part of it which relates to precedence? As I have the honour of holding office under the crown, I feel it my duty to state, that I have some apprehension for the consequences that may ensue. If this warrant, which gives to the serjeants the rank they now enjoy within the bar, be void, they must drop their silk gowns—they must wear their party-coloured robes, and must take their places without the bar, except at nisi prius; they must be behind all the king's counsel. But what is to become of a certain class of king's counsel, of whom Sir William Follett is one? King's counsel have been made; the first of them to take rank after Mr. Serjeant *Noon Talfourd*. These go in Westminster Hall by the name of the post-meridiems—they are made “after noon.” Mr. Serjeant *Talfourd*, to my very great regret, will not come and sit within the bar; he must take his place without the bar. Then, are Mr. *Thesiger*, and all the rest, to follow him, like a string of wild fowl, and to take their places without the bar likewise?—because the place appointed for them is next after Mr. Serjeant *Noon Talfourd*. It is a place that he enjoys, and which he would not be willing to leave. [Lord *Brougham*. I think it must be taken as the place that he held at the date of the warrant; otherwise, if the learned serjeant were to die, the king's counsel would be in a still more awful predicament.] I apprehend, that it would be the place that he then held: if he were made a king's serjeant, they would not follow him;—if by any misfortune he were degraded from that rank, they would not suffer the same fate. But that is the rank he enjoys under this warrant, which says, that Mr. *Thesiger* shall take rank after Mr. Serjeant *Talfourd*; but if the warrant be a nullity, Mr. Serjeant *Talfourd* enjoys no rank, except that of serjeant at law, and all those will be deprived of their rank. [Lord *Wynford*. He enjoys the rank next to that which Mr. Serjt. *Talfourd*

Precedence.

Mr. Solicitor
General.

Duties of judicial
committee.

Mauritius case.

Judge Boulton's
case.

Acquiescence
of Court.

and that *A.* was in the possession of *B.*'s place; could the crown be called upon, by the advice of the privy council, to issue a second equally illegal warrant to the King's Bench to say, that as the warrant of such a date was illegal, We now call upon you to oust *A.* and to put *B.* in possession of his old place.] The judicial committee is not to meet, merely to speculate upon what the law is, and to say — "Your Majesty can do nothing at all; but if you ask us our opinion, it is so and so." That is not the meaning of it, and never could be. Your lordships are now assembled, for the second time only, since the passing of that act, upon that clause. The only other occasion was, the occasion of the question respecting the slaves, in the Mauritius (*a*), where it was necessary that an act should be done by the crown. [Mr. Justice *Erskine*. There have been several other occasions.] There have been cases of another sort. The case of Judge *Boulton* was a case of this sort, in which the crown had exercised an undoubted prerogative in removing a judge. The question was, whether that was properly done; and it was referred to the judicial committee of the privy council. [Lord *Brougham*. The judicial committee repudiate its jurisdiction. Mr. *Attorney General*. The judicial committee is not to be made a debating club upon speculative questions.] The ground upon which the warrant is said to be illegal, is this, that the crown has no right to issue a mandate to any one of the superior courts, directing them in any way to interfere with any part of what is either the law of the land, or the practice of the Court. If that be an illegal act, yet the Court acted upon it, and recorded what it had so done (*b*). Now the crown finds that which it did was illegal, how can the Court set it right? Can the crown send now another illegal mandate to the Court of Common Pleas, to tell them to erase from their rolls something that has improperly found its way there (*c*)? It has not yet been stated, what it was that your lordships were to advise Her Majesty to do. Mr. *Austin* said, "Advise Her Majesty that the warrant was illegal" — For what purpose? Sir *W. Follett* did not even get so far as that. He spoke, in the course of his argument, of *revoking* the

(*a*) *Ante*, 115; *post*, 151, 157.

(*b*) *Ante*, 113, 118, 121.

(*c*) Appendix, No. XXXIII.

warrant. What is the meaning of that? What act is to be done to revoke it? That is something unknown to the law: all principle is against it, and not only all principle, but all precedent is against it. [Lord Wynford. If you once decide that it is not legal, you decide that it cannot be expedient.] Once determine that it is illegal, and of course it follows that it is inexpedient. But supposing it to be illegal, what is to be done then? [Lord Wynford. Her Majesty does not ask that. Her Majesty only asks us to decide—is it legal? Is it expedient (a)?] The serjeants pray that Her Majesty will be pleased to cause the legality and expediency of the document to be investigated. Her Majesty refers that petition to the privy council. But suppose your lordships come to the opinion, that Her Majesty ought not to interfere? The question is, whether you shall report to Her Majesty any answer at all; and whether your lordships will not report, “Whether it be legal or illegal, Your Majesty has nothing to do with it;” “that your lordships are of opinion, that this is not a question that can be settled in the present mode.” Cases of a very analogous class are occurring if not every day, certainly every month; in which Her Majesty frequently, in consequence of wrong suggestions, issues illegal warrants. Her Majesty has the power, by letters patent, of granting to persons, under certain circumstances, the exclusive use of certain inventions; but under certain circumstances she has no such power. Now, what is the course the party takes? He says, “I have a new invention for improved wheels upon a railway.” He presents a petition to the secretary of state, for letters patent. That petition is referred to the attorney and solicitor general; and in ordinary cases, if there be no opposition, they report—inasmuch as it is at the risk of the petitioners—that Her Majesty may properly grant her letters patent. What happens upon that? Her Majesty issues a warrant under the sign manual, not liable to the objection of not being countersigned, but countersigned by the secretary of state, directing a bill to be prepared to go to the privy seal, authorising a grant; and from the privy seal to the great seal. After

Mr. Solicitor
General.

Inexpediency
of warrant of,
1834.

Course, on ap-
plication for pa-
tent of inven-
tion.

Mr. Solicitor
General.

Patent-office.

Practice upon a
petition for a
patent.

Her Majesty has issued that warrant, it still is competent to parties, who find out that an illegal grant is going to be made, to oppose it. If Her Majesty have issued a warrant, directing a bill to be prepared authorising a grant of letters patent, still it is competent to a party to oppose it; and then he does oppose it upon this ground, that Her Majesty has issued an illegal warrant. Nay, after Her Majesty may have signed a bill to go to the privy seal, if, at the last, it is found out that this is all illegal, there is no process for revoking this warrant; the only consequence is, that the party who is to act upon it, the moment the illegality is discovered, says, "I shall not act upon it." For fear I should be at all misleading your lordships, I have, since I came here, sent to the Patent-office to know if any proceeding at all takes place; and I am told, nothing at all. There is no revocation of the warrant; only, the party whom the warrant directs to act, says, I shall treat that warrant as waste paper; it passes as a direction which cannot be carried into effect. A party presents a petition to the crown; and the first thing is, that a reference comes to the attorney or solicitor general from the Home Office, stating that such a petition has been presented, and asking what Her Majesty may be advised to do. Then, if there be no opposition, and the crown officers report that the letters patent may be properly granted, Her Majesty issues a warrant directed to the attorney general, to cause a bill to be prepared to carry that into execution. I can answer for the practice for the last five years (a), that it always comes, in the first instance, from the secretary of state to the attorney and solicitor general; and they report that there appears to be no objection. Then comes the warrant directing something to be done, which it afterwards turns out is clearly illegal. [Lord *Wynford*. You do not mean to say, that the attorney or solicitor general would recommend a patent to be issued which was clearly illegal.] Certainly not; wherever it appears either by the representation of the parties opposing, or where it appears upon the face of the petition, to be illegal, or else, where there is a suspicion upon the face of it, that it is illegal, then we

(a) Sir R. M. Rolfe was Solicitor General, 1834,—re-appointed, 1835.

stop ab initio. But it often happens, that we report a patent to be granted, when it afterwards turns out that we ought not to have so reported. Then the crown issues a warrant, setting the matter in motion, to get the letters-patent. Till that has been completed, by affixing the great seal, a party may, at any moment, interpose to have it stopped. Whenever that is done, no steps are taken to revoke the warrant. It is simply discharged, without any step being taken, either to cancel it, or to communicate to the crown that it has issued a warrant which it has not the power to do. The extreme inconvenience and inexpediency, of making this Court a tribunal for discussing abstract questions of this sort, are obvious. Soon after Lord *Mansfield* became Chief Justice, a question was referred to the judges, to know whether a particular course of conduct would, or would not, be legal? The judges made a report, stating their view of the case, but at the same time suggesting, that the case might come before them judicially, and therefore they would not be bound by what they had said. Here, if there be a right, there is a remedy. (a) Lord *Wynford* has suggested the difficulty there would be in trying the question. I admit that; and that leads me strongly to doubt the right. If there be a remedy, it must be a remedy to be tried and adjudicated upon, in the Courts of Westminster Hall, and which may come eventually to the House of Lords. This is not like the case of the Mauritius slaves (b), where it was necessary to know what directions were to be given; not like the case of a colonial judge. Your lordships are here called upon to commit yourselves by saying, "this warrant is legal," or "this warrant is illegal." Let me suppose that you say the warrant is legal; and then, that the serjeants treat that opinion with the utmost indifference, and institute proceedings against the first barrister that ventures to come into the Common Pleas. To which court would he go? To the Court of King's Bench—? The Chief Justice had here given his opinion upon the subject! To the Common Pleas—? Not only the Lord Chief Justice of that court, but three out of four of the puisne judges had been

*Mr. Solicitor
General.*

Lord Mansfield.

Inconvenience
of expressing an
opinion where
a party may be
judge in the
same case.

(a) *Vide* Appendix, No. XXXIV.

(b) *Ante*, 115; *post*, 157.

*Mr. Solicitor
General.*

Unnecessary
to make any
report.

Question, to be
decided by
Court of Com-
mon Pleas.

Adoption by
inrolment (d).

Collier v. Hicks.

here, and had joined in the decision ! To the Court of Exchequer—? The lord chief baron, also here, committed himself upon the question ! Or is he, if dissatisfied with these tribunals, to go to the House of Lords—? The lord chancellor and six other peers would have already pronounced their judgment (a). If there be no other course, if it be impossible to do justice without placing yourselves in this dilemma, it is a difficulty which must be encountered. But is this a case in which there is another remedy? If there is a right, there must be a power of bringing an action somewhere (b). That course will leave all the judges quite unbiassed to proceed as they would in an ordinary case. I have talked over this matter several times with the attorney general, and we have come to the conclusion that it was our duty, not to argue this as advocates, but simply to state what we thought the right view of this case. Arriving at the conclusion, that this is not a case in which it is the duty of the committee to report to Her Majesty any thing at all, except that it is a case averred upon the one side to be correct law, and on the other to be incorrect, and that the question may be tried in the ordinary manner, it appeared to me, that tendering my advice humbly and respectfully, I should advise the committee to put the judgment which they deliver upon this case upon that ground. The attorney general has shewn that the question, Who is to practise in the Court? is a question which, of necessity, belongs to the Court itself; and, therefore, supposing it to be true that His late Majesty had no power to issue this mandate, (which seems to me to be rather in the nature of a *recommendation* than a mandate (c),) still the Court had a right to adopt it; and whether the Court adopts it by making an actual order for the purpose, or directs the mandate to be inrolled, and then acts upon it, seems to be a difference merely of form. All the precedents shew, that the Court may regulate who shall act as practitioners. It has hitherto been the practice of the Common Pleas to permit serjeants only to be heard. The dictum of *Parke, B.* in *Collier v. Hicks* (e) points to an

(a) *Post*, 158. (b) *Vide* Appendix, No. XXXIV. (c) *Ante*, 2, 113.

(d) *Ante*, 113, 118, 121, 148.

(e) *Ante*, 93, 97, 129.

entirely different case,—to the converse of the present case; that the Court of King's Bench could not now, after centuries of contrary usage, say, "We will have none but serjeants." It is competent to any court, created *de novo*; to say, what persons shall practise before them as advocates. It is competent to the courts of Westminster Hall to do so, saving only the rights of parties who by long usage have acquired a right to be there heard. Barristers have acquired a right to be heard in the Queen's Bench; therefore the learned judge, in giving his judgment, guards himself by saying, "saving existing rights." He says, "I do not say that where there has been a peculiar class of persons that have long practised, it is competent to exclude them. A case analogous to that would be, if an attempt were made to exclude the serjeants from the Common Pleas." The Court could not do that. But this is treated as mere usage, which must have been created by the Court, and which the Court has the power of altering it. *Pessima exempla bonis principis orta sunt.* The great security the subject has always had against undue interference on the part of the crown in the exercise of some supposed prerogative, is this, that if the crown assumes to do any thing which it cannot do legally, the instrument by which it exercises that illegal power is so much waste paper, and should be treated exactly as if no such order had issued. If your lordships, by proceeding in this case, once sanction, directly or indirectly, the notion, that in order to get rid of an illegal mandate issued on the part of the crown, it is necessary (a) for the judicial committee to advise, or to do some act, to revoke it, who shall say to what length that may go? Suppose an illegal warrant of arrest issued by the crown, is this committee to assemble to desire that it may be revoked? The party has a much better remedy in his own hands. He has a right to say, "this is just as if John Nokes had made such an order, I shall pay no attention to it" (b). That is a security which has distinguished this country, and countries which have acted under English law, from

Mr. Solicitor
General.

Vested right of
practising as
advocates.

Illegal orders
of crown, to be
disregarded.

Peculiar feature
of English law.

(a) It was not contended that, by the advice of the privy council, the crown would be empowered to do an act which it could not do without such advice.

(b) But the warrant would not be directed to the party to be arrested.

*Mr. Solicitor
General.*

most foreign nations, where the act of parties in power is clothed with a sort of *primâ facie* efficacy, with which, if it be contrary to law, it is not invested here. I therefore humbly submit, that the advice which ought to be tendered to Her Majesty, is, that this is a mere matter of private right between two classes, which, if it exists at all, must be capable of being tried in the ordinary mode in which rights are tried, and in respect of which, therefore, it is not expedient that Her Majesty should take any step whatever. [Lord Cottenham, C. Can you suggest any mode in which the question might be tried?] Either it may be tried by an action at the instance of the serjeants as a body (*a*), or of a single serjeant (*b*), or by an apprentice against a serjeant. If it cannot be so tried, that is conclusive that no such right exists. [Sir J. Campbell, A. G. Mr. Serjeant Taddy gave notice, that he should make a motion upon the subject in the Court of Common Pleas (*c*). Now, if that motion were made, the decision of the Court would be obtained upon it. Tindal, C. J. How can you get that upon the record? Lord Brougham. We thought, that by their having agreed (*d*) to it, they had considered it, and were of opinion, that it was a legal order. I never heard the least doubt expressed upon the subject till Mr. Serjeant Taddy spoke to me one day in the House of Lords, and we went together into the library and looked into it, in the last session, or the session before that. Lord Abinger. I must own, that I formed an opinion, at the time, that it was a very illegal proceeding, taking away the exclusive privilege of the antient practitioners of a court of justice, and also giving rank, not by patent, to some fourteen or fifteen gentlemen over others. Lord Brougham. But if that was your impression at the time, you must have had a contemporaneous impression, that the Court of Common Pleas differed from you, otherwise they would not have acted in favour of it. Lord Wynford. I do not understand, that that was the opinion of the Court. Lord Brougham. Nobody made the least objection to it.]

(*a*) See the *Tunbridge Wells Dippers'* case, (*Weller v. Baker*), *ante*, 84, 117.

(*b*) See *Westbury v. Powell*, Co. Litt. 56, and Cro. El. 664, *ante*, 117.

(*c*) No such motion was made.

(*d*) *Ante*, 15, 101.

Mr. *Austin* in reply (a). I scarcely know in what position I now stand at your lordships' bar. I have been arguing that this is an illegal warrant, and cannot be sustained; and the very first words offered by the attorney general are (b), that he conceives that the warrant is an illegal warrant, and that it cannot be sustained. [Sir *J. Campbell*, A. G. It seemed to me that it was not binding upon the Court of Common Pleas.] If this had been thought to be a legal warrant, we should have heard a good legal argument from my learned friend in support of its legality. Both the attorney and solicitor general have conceded distinctly that this warrant cannot be sustained at law. Then I humbly ask your lordships, in the names of the petitioners, that you will state to Her Majesty, that which Her Majesty's attorney and solicitor general admit, that the warrant is illegal. [Lord *Brougham*. What is to follow upon that?] Her Majesty being so informed, it does not appear to me that there is any of that great difficulty which has been suggested. When this petition was presented by the serjeants, it was desired that this question should not be presented litigiously to the Common Pleas, that it might not be put in such a form as to compel that Court, in a certain event, to overrule an act of the prerogative. The prerogative having been, in the judgment of the petitioners, erroneously exercised, they thought,—and I believe, as well the judges of the Common Pleas (c), as the serjeants, thought,—that the proper course was, to obtain an opinion from this high tribunal. The attorney general says, there is no precedent, no form, by which the validity of this warrant can be tried. The solicitor general says, that all the serjeants can bring an action (d), and so the matter may be put upon record and subjected to appeal—without discussing that, I will suggest what may be done. The judges of the Common Pleas feeling great delicacy in considering a question of this sort, it has been referred to the judicial committee, in order to obtain the decision of this high tribunal,—the Queen is advised that the warrant cannot be maintained. The effect of that is, that the Court of Com-

(a) Sir W. Follett was absent from indisposition.

(b) *Ante*, 119, 120.(c) *Ante*, 16.(d) *Ante*, 154.

Mr. Austin. Common Pleas stands in its old legal position. The attorney general says, that notwithstanding that advice, there is nothing to debar him from going to the bar of the Common Pleas and offering to move. But he would be in precisely the same condition, as if he had offered to move before this warrant was issued. The matter would have been considered by this tribunal, in a manner in which it was not considered respectful for that Court to entertain it. It would then have been considered, by this, the highest tribunal; and the Common Pleas would find no difficulty in acting upon acknowledged rules of law. Supposing any thing has been done which will require to be revised;—supposing this matter has been recorded in the Common Pleas (a),—surely there can be no difficulty in getting rid of a record of that description, if it be necessary to get rid of it. In cases of scire facias, the inrolment is vacated by drawing three or four lines across the inrolment (b); what difficulty could there be in making an application to that Court, and in the officer's being ordered to strike his pen through this inrolment? In that way, the inrolment would be vacated, there would be no vestige left of this mandate, and things would be remitted to their original state.

Precedence. [Lord *Brougham*. What would become of the rank?]—It having been conceded that the warrant is illegal, it is conceived that the rank would not survive. But the matter submitted to your lordships is, the legality of the warrant.

Illegality of warrant revoking illegal warrant? [Lord *Brougham*. How do you understand that the communication shall be made to the Common Pleas, supposing the Court are of opinion that the warrant is beyond the power of the crown? The crown has no more right to grant a warrant declaring the former warrant illegal, than it had to grant the illegal warrant itself. The error, if it was committed, was by granting a warrant at all.] It may be conceded, that if the crown were to grant another warrant to the Court of Common Pleas, to vacate this, the present warrant, such other warrant might be considered illegal. [Lord *Brougham*. And that must be cancelled also.] It would not follow; but I do not profess to know precisely what the practice is upon such an occasion. A petition

(a) *Ante*, 118, 118, 121, 148.

(b) See Appendix, No. XXXIII.

has been presented to Her Majesty, who has been pleased to refer the matter for the consideration of the judicial committee of the privy council, [Lord *Brougham*. Is there any instance of the judicial committee giving an answer to the crown, as counsel would give upon being consulted upon a point, namely, not advice, which is the duty of counsellors, but a mere opinion in point of law ?] The *Mauritius* case (a) was a case of that description. It was a mere question of law (b). [Sir, *R. M. Rolfe*, S. G. There the question was, whether, under the circumstances of the registration, the slaves had become free or not. Lord *Wynford*. In that case nothing could be done by any court; but the king thought proper to refer it to the judicial committee, to ascertain the state of the matter in point of law, before directions were given to the colonial secretary. Here the difficulty is, that we may come directly in opposition with the Court of Common Pleas. Dr. *Lushington*. In that case an action might have been brought against the governor of the colony (c). Lord *Cottenham*, C. There was a clear right of action there; but I find no form of action suggested here.] All these difficulties are raised, upon a consideration quite foreign to the question submitted to your lordships. The only difficulties conjured up, are these, which arise from a consideration of what is to be done hereafter. Whatever the course may be, when the privy council has made an answer upon a reference of this description, there can be no difficulty, if the crown communicates the answer to the petitioners. Every thing will then have been obtained by the petitioners in this case, which they sought for (d). This question of law, which they did not wish to submit to the Common Pleas in a hostile manner, will have been submitted to, and decided by, this tribunal; and there can be no difficulty in making the proper application to the Common Pleas, if it should be necessary to make any application, or to take any steps there. In the case of the *Mauritius* slaves (a), the question submitted to the privy council

Mrs. Austin

Reference to a judicial committee of privy council of a point of law.

(a) *Ante*, 115, 151; *post*, 156; Appendix, No. XXXV.

(b) See the terms of the reference, Appendix, No. XXXV.

(c) See *Fabrigas v. Mostyn*, Cowp. 141: *Smith's Leading Cases*, 140.

(d) *Ante*, 12.

Mr. Austin.

Previous expression of opinion by persons who may have to decide judicially.

Terms of the reference to the Privy Council.

Case of the Deccan Prize Money.

was purely a question of law. It was whether or not the Mauritius slaves were by virtue of some act of parliament free at a certain time. [Lord *Brougham*. There was another question,—of right to compensation.] But it was a mere question of law. The solicitor general says, this question ought not to be answered, because it may be, that in case all the serjeants should bring an action, and the matter should get upon record, some of your lordships, who are now considering this question, may have to sit as judges upon that case (a). Is there any sort of objection to your lordships giving an answer to this question? In the case of the Mauritius slaves, some proceeding might have taken place, from which proceeding an appeal would have lain to the privy council; and your lordships, as members of the judicial committee, might have been called upon to decide judicially upon the matter, upon which you had given before an answer, by way of opinion, to the question asked by the crown. The lord chancellor sits in the House of Lords, forming a court of appeal from the lord chancellor. Many of your lordships sit in the House of Lords, as judges of appeal from decisions pronounced, partly by your lordships, in courts below. That can be no objection; and whether your lordships' answer according to the terms of this reference, be that the warrant is legal or is illegal, there can be no difficulty, whatever, affecting the consideration of this question. The Queen has submitted it in distinct terms—Is the warrant legal, or is it illegal? Ulterior difficulties were not referred. The question is not what step may be taken, supposing the warrant to be illegal, but simply,—as in the case of the Mauritius slaves,—Is such a warrant a legal or an illegal warrant? [Dr. *Lushington*. I entertain great doubt whether that is the question submitted to us. In the case of the *Deccan booty* (b) there was a general reference here, to know what was to be done upon certain memorials that had been sent in from time to time. The privy council were of opinion, that they were not called upon, after hearing the arguments, to enter into the question of the merits at all; but that they were perfectly competent to state to His Majesty,

(a) *Ante*, 151.

(b) Appendix, No. XXXVI.

that they would give him no advice whatever upon the merits, but recommend His Majesty to refer it back to the Treasury. So, I apprehend, upon the present occasion, it will be perfectly competent to this board, if they think fit, to advise Her Majesty, that they think nothing ought to be done by the crown. There is a distinction to be made between a special reference and a general reference. In many cases the reference is special, and there it would be competent to take into consideration the merits; but where it is general, you may advise the crown that the privy council think that nothing ought to be done by the crown. Sir *L. Shadwell*, V. C. Here there is no question put, but the petition is referred.] In our case nothing is put in this petition but a mere point of law. [Dr. *Lushington*. It depends upon the terms of the reference to the privy council, whether the crown makes it in a specific form, or whether the crown refers a specific document simply and generally, without saying what the privy council is to do.] Surely it must depend upon the *matter* that is referred to the council. [Sir *L. Shadwell*, V. C. The *petition* is referred. Lord *Wynford*. The *petition* is referred, and then the opinion of the Judicial Committee is asked as to the expediency of the warrant.] The order is a general reference of the petition in which the warrant is illegal. In the petition it is not suggested, that at the time the warrant was issued, it was not *expedient* that the Court of Common Pleas should be opened,—nothing of the sort by way of excuse for presenting the petition. The petitioners suggest, that the opening of the court has not answered the expectations of those who advised the warrant to issue; but they make no suggestion with respect to the *expediency* of opening the court; the prayer is, that the *legality* of the warrant may be investigated. Now, whether its *terms* be general or not, how can this reference be otherwise construed, than as being a mere reference of the question, as to whether or not it was a legal or an illegal warrant? Upon another ground also, it appears to me, that your lordships will think proper to advise Her Majesty. This is not only a question touching the consequences of opening the court, either to parties practising in the court, or to the

Mr. Austin.

Reference, special or general.

Mr. Austin.

suitors, or to the public. It is a question affecting the royal prerogative, a question which it may be extremely important for the crown to be advised upon. Supposing nothing is done—supposing the warrant remains in its present state recorded in the Common Pleas—suppose the Court remains open—how can it be said hereafter, especially coupling all these circumstances with the case of *Power v. Izod* (a), the decided case upon the effect of this warrant, that the Court has not been opened *by virtue of that warrant*, which warrant, it is admitted here to day, was an illegal exercise of the prerogative? (b) Surely it is a matter of great moment to get rid of any record of an illegal exercise of the prerogative, if the prerogative has been so exercised upon this occasion, which is admitted by Her Majesty's legal advisers, so that upon that ground I think it may be extremely material for your lordships to answer this question. [Lord *Brougham*. I understood the admission to be, that whether legal or illegal—was a question for the courts of law.] I distinctly understood my learned friends to admit, that the warrant cannot be sustained (b); and they have offered no answer, whatever, to the arguments that have been addressed to your lordships in support of the contrary proposition. The Attorney and Solicitor General have distinctly admitted that they cannot sustain the warrant. [Sir *J. Campbell*, A. G. I stated, that in my opinion, it was not *obligatory* upon the judges of the Common Pleas. That was the utmost extent to which my observations went. *Tindal*, C. J. Then it cannot be much of a *warrant*, because it is addressed to them alone. Sir *J. Campbell*, A. G. It may be legal, as submitting matter for the consideration of the Common Pleas; just as at the beginning of the session there may be, from the throne, a speech recommending the two houses of parliament to consider whether they will agree to certain measures; but the crown does not thereby say, *proprio vigore*, that laws to that effect shall be made. This warrant expressly submits (c) that the Court should do what was necessary for carrying these purposes into effect.] My learned friend says the warrant is not binding upon the Common

(a) *Ante*, 23, 93.

(b) *Ante*, 119, 120, 155.

(c) *Quære*.

Pleas. The warrant orders the Court to make rules for the bar. If it be not obligatory on the Court, what becomes of the order? It is an illegal order; and my learned friends, by not attempting to answer the arguments on this subject, have confessed that the warrant cannot be maintained. It is now said, (if I am to answer an argument that was totally unexpected,) that, although the order is illegal, although it is not binding upon the Common Pleas, nevertheless the Common Pleas have adopted it,—that is the phrase used,—they have *adopted* the order by inrolling it; and by inrolling it, they have made it a rule of Court (a). It is necessary for my learned friend to go many steps further, before he can maintain that proposition; because the Court of Common Pleas could not make any such rule, unless they had power to regulate the persons who should practise in the character of advocates before them. With respect to the inrolment, the Attorney-General (although he will not accept our suggestion that this petition has been presented, and this application made, on the ground of the respectful duty that the serjeants owe to Her Majesty,) says, that such was the dignity of the serjeants, that it was conceived right that the crown should interfere by *recommendation* to the Court of Common Pleas, to exercise their power in making a rule that barristers should be admitted. Now that, even if it were in the order, would, I take it, be illegal under the statutes. But the language of this *recommendation* is very singular, the recommendation is, in fact, a most peremptory command. It is not “We recommend to the Court of Common Pleas,” but “We *order* and *require*.” First of all, the crown says, “We hereby order and direct that the right of practising shall be in all the bar;” and secondly, “We order and require the Common Pleas to make rules.” Upon the very face of the document, therefore, that *limitation* will not succeed; and it ought not to succeed. That is a very dangerous sort of language to couch a recommendation in. If it were meant as a recommendation, it might be mistaken for an order; and, accordingly, it does appear that the Court did mistake it for an

(a) *Ante*, 113, 118, 121, 148, 156.

Mr. Austin.

Common Pleas
acted as upon
an order, not as
upon a recom-
mendation.

Power of Court
of Common
Pleas to admit
barristers to
practise.

Power of King's
Bench and
Exchequer.

Independence
of the bar.

order. It never occurred to the learned judges, that the crown was merely *suggesting*, for their consideration, what might be done; they unhappily understood the words according to their plain import, and they thought that the meaning of those words was, that they were compelled to admit barristers to their bar. That, in the opinion of the judges of the Common Pleas, appeared to be the legal construction of this instrument. It is quite plain that such is the construction they put upon it; and in the presence of the chief justice of the Common Pleas, I state it as an unquestioned fact, that other barristers never were admitted to practise in that Court by virtue of any *rule of Court*, but distinctly, and beyond the possibility of doubt, by virtue of a *special order from the crown*. That, no doubt, was the footing upon which they were admitted to practise in the Common Pleas. Therefore, as matter of fact, the suggestion totally fails. This order has been inrolled, and it has been acted upon. It has been acted upon *as a valid order*, not as a rule of the Court of Common Pleas; and that is a complete answer to the suggestion of my learned friends. Upon the other question, a question completely new to me, I cannot be expected to throw much light by way of reply. Even if it were to be considered as a rule of the Court of Common Pleas, I should say, with great submission, that the Court of Common Pleas has no such power,—that the Court could not admit other persons than serjeants to practise. The Common Pleas labour under the disability imputed to the prerogative of the crown. Now what is the doctrine that the Attorney-General is obliged to adopt? First, he says, that the Common Pleas have the same power as the King's Bench has. I do not know where it will be found that the King's Bench, or the Exchequer, has power to admit any persons to be heard at their bar, except persons called by the inns of court. I speak with hesitation, because it is a subject that I have not sufficiently investigated; but certainly, no authority has been shewn. I submit, that neither the King's Bench, nor the Exchequer, has any power whatever to hear other persons (except the parties themselves) than those who have been called to the bar by the inns of court. It has

always been considered, as a matter of great importance, that the bar should be an independent body ; but what is the maxim set up to-day ? It is proposed, to give the King's Bench and the Exchequer, as well as the Common Pleas, absolute arbitrary and despotic power over the bar. Nor does the attorney-general shrink from the result of his propositions. He says, the King's Bench might admit attorneys to practise at their bar. Can he stop there ? When he has once broken down the barrier, how can he refuse to go on ? By what authority is it that the Court can admit attorneys to act as advocates ? It is said, by that inherent authority, which, of necessity, exists in all courts of justice, of regulating its own proceedings. Now, if there be that inherent authority existing in the King's Bench, any body may be heard at the bar of the King's Bench as an advocate. It cannot be contended, that the Common Pleas have authority to open the Court to barristers, without going the length of saying, that the King's Bench can, in any case before them, admit any body as an advocate at their bar. Nor does the attorney general stop there ; for he says the King's Bench has absolute power, with reference not only to the parties whom it may admit to plead at the bar, but to the precedency of those parties amongst themselves ; that the chief justice of the King's Bench could, if he pleased, commence with the junior barrister, or commence with a barrister between the senior and the junior. And he cannot even stop at this point. Supposing that two counsel had been instructed to argue a cause, a king's counsel and another barrister, the attorney general must go the length of saying, that it would be competent to the Court to order the other barrister to be heard first, and thus to interfere with the well understood rights of private parties ; and as the attorney general does not shrink from applying his rule to all the Courts, a judge sitting at Nisi Prius might order a junior to open the case, and to conduct the cause before the jury. What authority is produced for these startling propositions ? First, with respect to precedency, there is the authority of Lord *Bacon*, read from some amusing book, of which the attorney-general appears to have several in his bag ; for he has dealt

Mr. Austin.

Attorneys.

Authority of Courts to decide who shall practise as advocates.

Precedence.

Lord Bacon's "fancy."

Mr. Austin.

Inferior Courts.

more in ridicule upon this occasion, than in solemn argument. It is said that Lord *Bacon*, upon some occasion, when he took his seat, told the judges' sons that he would hear them before serjeants' sons, and that he would hear serjeants' sons before readers' sons: Now is that to be held as a solemn decision in a court of law? Is it even to be held to be the expression of the deliberate opinion of Lord *Bacon*? Lord *Bacon* had no power so to act. There is no instance of such a power being exercised before his time, no instance of such a power being exercised since his time, or in his time, for it does not appear that Lord *Bacon* acted upon that suggestion. It does not appear that a judge's son *was* heard before a serjeant's son, or that a serjeant's son *was* heard before a reader's son. It was described in the very passage read, as being a "fancy" of Lord *Bacon*. It was a fancy, and had no foundation in law. Next are cited the cases of the Quarter Sessions (a), the Insolvent Court (b), and many other inferior courts. There can be no difficulty in explaining how it is, that these courts have the power of regulating proceedings of this description. They are *new* courts; and if nothing be found in the act creating them, it may readily be admitted that they have the power to say, who shall practise before them. They have the power to admit attorneys, because, being a new court, there is no usage existing to the contrary; and then *Collier v. Hicks* (c) decides this question; for according to the plain language of *Parke, J.*, upon that occasion, (by which the language used by Lord *Tenterden* and the other judges, clearly must be interpreted,) the opinion entertained at the time by them, was, that although this new court had necessarily the power of so regulating its proceedings, that is not the case with an old court, where the proceedings may be regulated by usage. How then is this applied to the Common Pleas, admitted to be an antient court. It is impossible to point out the time of its inception. No man can say what the period of its origin was. The usages of a court of that description are to be interpreted in a totally different manner from the proceedings of a court of novel institution; and it is no answer, to say that the an-

(a) *Ante*, 124.

(b) *Ante*, 125.

(c) *Ante*, 94, 129; *post*, 167.

tient court must once have been a virgin court (a). The authority of *Roger North* has been cited, who, in a most amusing book, has given a very amusing description of the dumb day. It was not to be expected that an accurate report should be given by a hand that was not professional (b). But even that report is not available for the purpose for which it has been quoted. After all, it simply amounts to this, that the judges there say, "If the serjeants, in consequence of this misunderstanding, do not appear to-morrow, and conduct their clients' cases, as they should (c), then we will consider, whether or not, we will hear attorneys in the Court, or the barristers, or the parties themselves." What proof have we that this threat was ever made. Is there a regular legal report of any such proceeding that took place in the Court? But supposing it were so, no such threat was acted upon. It appears indeed by the statement, that the serjeants, next day, were afraid of losing their monopoly. That apprehension might be well grounded or ill grounded. It may have been that the serjeants fancied that the judges might open the Court, and they may have been wrong in that supposition; at all events nothing was done, matters went on as they always had gone on, and there is not the slightest pretence for saying that that is a case throwing any light on the power of the Court of Common Pleas. [Lord *Brougham*. The office of serjeant is conferred by writ of the crown, and the office of king's serjeant is conferred by patent of the crown. Certain rights attach to a person clothed with the office of serjeant, the moment the writ is issued (d): now do not certain rights attach also to the office of king's serjeant, the

Mr. Austin.

Dumb day.

(a) *Ante*, 129; *post*, 226.

(b) Roger North however was called to the bar; and he appears even to have practised as a barrister under the *patronage* of his brother, the Lord Keeper Guilford, *ante*, 142 n.

(c) Quære, whether a refusal to do so would justify the Court in *estranging* them from the bar. See the serjeant's oath, *ante*, 13.

(d) The party is commanded, immediately, according to the present form of the writ (*ante*, 13,) or at some prescribed day, according to the antient form, (*post* Appendix, No. XLV.) to take upon himself the state and degree of a serjeant at law. Neither the writ, without the act of the party, nor the act of the party, without the authorization of the writ, is sufficient. "The king cannot, by his writ or otherwise, make a man a knight or a serjeant; he can

Mr. Austin.

Warrant of
1814(a).

moment the patent is expedited and the oath is taken ? Then, if the crown, by making a serjeant, gives him rights which are indefeasible, as long as he is a serjeant, so, I suppose, by making men king's serjeants, rights are given them which are indefeasible so long as they are king's serjeants ; then it is quite clear, that the crown has been induced to take away their rights, by postponing them to the attorney and solicitor general.] I apprehend that is not so. The crown may grant precedence in the Court of King's Bench, for instance, or in the Court of Common Pleas ; but the warrant of 1814 (a) gave no precedence in the Court of Common Pleas whatever(b) ; it did not affect, in the slightest degree, the standing of any single individual at the bar of that Court [Lord *Brougham*. The rank of king's serjeant is not confined to the Court of Common Pleas ; it extends to the Court of King's Bench as well ; a king's serjeant has rank in the Court of King's Bench. Then, though A. is a king's serjeant, and has the rank belonging to that office, the crown assumes, in the warrant recorded in 1814(a), to postpone his rank to those of inferior rank, yet it did not take away the office.] That warrant interfered with the prerogative of the king's serjeants, no doubt. [Lord *Brougham*. The argument is, that as soon as he holds the office of king's serjeant, a monopoly has attached as much to the king's serjeant, as the monopoly in the Court of Common Pleas attaches to common serjeants.] The mere precedence of the serjeants inter se, the attorney-general admits to be of no weight ; because he considers that the interference of the crown,

only command the party to make *himself* one." Lord *Abergavenny's* case, 12 Co. Rep. 71. Knights are now sometimes made by letters patent, in which case the dignity vests, as in the case of a grant of peerage by letters patent, immediately upon the great seal's being affixed ; *post*, Appendix, No. VIII. But it does not appear that serjeants have been so created, though by resorting to such a mode of creation the necessity of passing two acts of parliament, 39 Geo. III. c. 119, and 6 Geo. IV. c. 95, would have been avoided.

(a) *Ante*, 6, 18 ; *post*, Appendix, No. LV.

(b) Because, notwithstanding the precedence given to the attorney and solicitor-general, Sir *William Garrow*, not being a serjeant, could not practise in the Court of Common Pleas ; and the then solicitor-general, Sir *Samuel Shepherd*, retained under the warrant, as solicitor-general, the same position which he had, before the warrant, occupied as the king's antient serjeant.

in the way of *precedence*, does not shew that the crown had any power ultra that precedence (a). Mr. Austin.

It seems unnecessary to reply to many other observations, which have been made, I presume, by way of strengthening the proposition, that, by necessity, the courts have the power of regulating the number and qualifications of the advocates practising before them. Several extreme cases have been put; one was, "Suppose all the serjeants, by any calamity, should happen to be unable to attend the Court?"—a suggestion thrown out in *Genney's* case (b) by *Littleton J.* The answer of the lord chief justice was, "Then, by necessity, other serjeants must be created." And the same answer will apply to the famous case of Serjeant *Bendloes* (c) only that there is a much better answer in fact. [Sir J. Campbell, A. G. The chief justice says, "No serjeant shall be made for necessity."] It is clear what the meaning of it was (d), particularly if read in French. It was a suggestion by *Littleton, J.* "Suppose all the serjeants were dead; then might we not admit, for the ease of the suitors, other barristers in the cause?" The chief justice said, that then, i. e. upon that incorrect view of the case, there should be no serjeant made for necessity; intimating clearly, that he did not accede to that suggestion, but that the true course to take, would be to create fresh serjeants to the number required; which the crown may do.

As to that story of Serjeant *Bendloes*, in the Preface to *3 Modern*, from which it is inferred that at one period there was but one serjeant at law, the attorney general is quite wrong in his facts. It is not true that there was ever but one serjeant in esse at one time. It certainly does appear (e), that there was one disastrous term—a worse supposition than that all the serjeants were dead—that there was a term, in which there was no business to be done, and that Serjeant *Bendloes* was the only serjeant who thought it necessary to go down to the Court,—I hope with no improper motives. Peradventure there might be

(a) Nor would any illegality, supposed to attach to the warrant of 1814, have become sufficiently inveterate to sanctify an illegality in the warrant of 1834.

(b) *Ante*, 42. (c) *Ante*, 138. (d) *Vide* Appendix, No. XXXVIII.

(e) *Sed vide ante*, 138; Appendix, No. XXVIII.

Mr. Austin. some motion, with half-a-guinea upon the back of it (a), stirring, and he went down to the bar to do whatever little business there might be upon that occasion.

Against the proposition which has been advanced, that the Court of King's Bench, and the Court of Common Pleas, and the Court of Exchequer, have absolute authority with regard to the persons whom they shall call to the bar, and the qualifications of those persons, it is a strong and decisive circumstance, that the attorney general has not brought forward a single authority in support of it. Authorities have been adduced, in the course of this discussion, which tend to shew that the courts have no such power. It is clear that the necessity insisted upon does not exist, and that no such necessity was contemplated in *Collier v. Hicks* (b). The opinion of the Court upon that occasion was, that although the inferior courts have the right of regulating those matters, as part of their proceedings, the superior courts possess no such power where the matter has been regulated by antient usage.

Mr. Austin having concluded his reply, the Court adjourned the case until the first day after Easter term (c).

Shortly before the end of Easter term, Messrs. Lawford, the solicitors for the petitioners, informed Mr. Greville, the clerk of the privy council, by letter (d), that it was the intention of the petitioners to attend their lordships for the purpose of receiving the judgment of the Court. In answer to this letter, a communication (e) was received from the clerk of the council, stating that no judgment would be given until further notice.

(a) Should any cavil be raised against this jocular allusion, on the ground that guineas and half-guineas were unknown to serjeants who flourished in the sixteenth century, the objector might be reminded, that, in antient records, instances occur in which the "guanois d'or," issued from the ducal mint at Bordeaux, by the authority of the Plantagenet sovereigns of Guienne, were, by the same authority, made current among their English subjects; and it might be suggested, that those who have gone to the coast of Africa for the origin of the modern guinea, need not have carried their researches beyond the Bay of Biscay. *Quære*, whether the Guinea Coast itself may not owe its name to the "guanois d'or," for which it furnished the raw material.

(b) *Ante*, 94, 95 164.

(c) 9th May, 1839.

(d) Bearing date the 4th May, 1839. (e) Bearing date the 6th May, 1839.

APPENDIX.

NO. I.

English Advocates (a).

MR. REEVES gives the following account of the antient English practitioners.

Appendix.

"The different orders of practisers are thus stated by Fleta (Lib. 2, c. 37)—*Servientes narratores, attornati, et apprenticii*. The apprentices it should seem, were students, who, it is said, (and probably by the above ordinance (*b*)), were first permitted by Edward I. to practise in the King's Bench, in order to qualify themselves to become, in a course of years, *servientes* or *serjeants*. Whether *servientes* and *narratores* (or, as they were called in French, *countors*) were two distinct orders, or narrator was only an additional description of a *serjeant*, may be doubted. It has commonly been taken in the latter sense, in stat. Westminster 1, c. 29, where the same words come together, *si serjeant countor, ou autre* (*c*); and that statute ordains imprisonment for a year and a day, on a person of that description, who was guilty of any collusion in practice. As neither attorneys nor apprentices are mentioned in that statute, we may suppose such persons were not then entrusted with the conduct of business in court; if so, it is probable they had not that authority till the above ordinance; though it may be observed, that Fleta speaks of them as equally subject to this punishment with *serjeant countors*."—2 Reeves's Hist. of Engl. Law, 284. In his 5th or supplementary volume, relating to the reign of Elizabeth, he says, "We have seen that heretofore there were only two description of advocates; these were *serjeants*, and *apprentices*. But we find in this reign, and no doubt it had been so some time, that the orders of the profession were these: the lowest was a student, called also an *inner barrister*; and so distinguished from the next rank, which was that of an *outer, or utter, barrister*; then came an *apprentice*; and next a *serjeant*."—5 Reeves, 247.

(a) *Ante*, 7, 33-4, 49, 50, 71, 86, 90, 116, 126-9, 132, 146.

(b) That addressed to John de Mettingham, *ante*, 45.

(c) *Et vide ante*, 72; *post*, 170.

Appendix.

In the Harleian MSS. in the British Museum (298, fo. 56,) is the following entry of a plea pleaded by Serjeant Marshall in an action (the nature of which does not appear,) pending in the King's Bench at Oxford, T. 25 Edw. I. "And then Thomas le Mareschall says, that he is a common serjeant-countor before justices and elsewhere, wherever he can be most serviceable in his office of a common serjeant-countor (coram justiciariis, et alibi, ubi melius ad hoc conduci poterit), and that he, in the plea of the said assise, stood with (a) the said John before the said justices, and assisted him herein, as much as he could, as his serjeant (tanquam serviens suus), and as it is lawful for such serjeants in such cases (et sicut talibus servantibus, in hujusmodi casibus, licet). This appears to be the entry referred to by Whitlock in his address to the Serjeants in 1648 (b).

In the Abbreviatio Placitorum in Domo Capitulari Westm. asservat. 295 b, is the following entry, respecting an advocate in the ecclesiastical courts. "Master William de Helmeswell, and Master John de Maldone, were attached to answer William de Welleby, of a plea of conspiracy. Whereupon he complains, that whereas the same Master William impleaded the same William de Welleby, in the court of the king before the king, by writ of trespass, against the peace of the lord the king; and the same William de Welleby, by a certain inquest in which he put himself, was, before the lord the king himself, acquitted (quietus recessit) from the said trespass imposed on him by the said Master William; yet the said Master William and Master John, by conspiracy and confederacy between them maliciously made, procured the said William de Welleby to be cited before the archdeacon of the bishop of Lincoln, to answer the said Master William of the trespass &c. And Master John says, that he is a *common advocate*, and stood with the said Master William for his giving (quod est communis advocatus, et stetit (c) cum predicto Magistro Willielmo, pro suo dando), against the said William de Welleby. Master William says, that he caused him to be cited for another trespass, and not for the first. But, by the jury,—he is guilty, to the damage of the said William de Welleby of twenty-four marks. And Master John is acquitted, because he is a *common advocate*." In the King's Bench at Lincoln, H. 29 Edw. I. rot. 19.

Dugdale says, (Origines Juridiciales, 21,) that the professors of the law, till 2 Henry III., were usually of the clergy. To which Selden adds, (Dissertatio ad Fletam, 519,) "or rather till

(a) 3 Campb. 98; 1 Mood. & Rob. 254. (b) *Post*, Appendix, No. XXXII.

(c) *Post*, 174.

the year 1164, temp. H. II. when by a canon in the Synod of Tours, under pope Alexander III., it was ordained "*quod post votum religionis, nullus ad physicam, vel ad leges mundanas, legendas, permittatur exire.*" But the "*votum religionis*" here spoken of, appears to be the monastic vow, and not the less rigorous engagement of the secular clergy; and "*legendas*" seems to refer to public lectures, rather than to forensic practice.

Appendix.

No. II. (a)

Separation of the Court of Common Pleas from the Aula Regia.

The following case appears to shew that in the time of Henry II. the King's Bench, Common Pleas, and Exchequer, sat as one Court (*b*).—*Abbreviatio Placitorum in Domo Capitulari Westm. asservatorium, 54.*

In the Court of Common Pleas, M. 8 John, (1206.)

Robert de Aubeni demandeth, against Geoffrey de la Mare, the town of Dudcote (Didcot in Berkshire) as his right. In the course of the pleadings, Geoffrey produced a charter of the king's father, Henry II. in this form: 'Henry, King &c. Know ye, that I have given, and by this my charter have confirmed, to Hugh de Mara, for his homage and service, in fee and inheritance, Dudcote with all the appurtenances, which Robert de Aubeni has quit-claimed to me from him and his heirs, in my Court at Westminster, *before me and before my barons and justices* then there present, in satisfaction of his great offence—to wit, for casting a stone, wherewith he, without provocation, struck me, (*pro concordia magni forisfacti sui, scilicet, pro ictu lapidis, quo me, gratis, percussit,*) before the Castle of Bedford (*c*), he being, before that time, my liegeman (*desicut erat ante homo meus ligius*). For this quit-claiming of the said land, I have

(a) *Ante*, 10, 38, 68.

(b) Though exercising different functions, as forming so many distinct *committees* appointed by the king for the dispatch of particular branches of the business of the Court.—Palgrave, *Hist. Comm.* 291.

(c) This cannot refer to the siege of Bedford by king Stephen in 1137. Henry had then no *lieges*, and was only four years old; besides which if the words "*before the Castle,*" "*coram Castello,*" import a siege, Henry would appear here to be the party besieging. The siege of Bedford mentioned in 1 Rot. Parl. 54 b, 170 a, in which the woods at Puttenho, belonging to the abbot of Warden, were destroyed by the king, was that undertaken by Henry III. in the following century. And see 1 Dugdale's *Baronage*, 223, 224; 1 Gough's *Camden*, 323; 1 Lysons's *Magna Britannia* (Bedfordshire), 44.

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remitted to him and his heirs the said offence. Wherefore I will, and firmly command, that the said Hugh and his heirs hold hereditarily the said Duncot, fully with all appurtenances, of me and my heirs, free and quit of all suit of counties and hundreds, of all demands of hidage and of other customs, by the service of half a knight (*a*), for all services, doing such service of half a knight with the knights of the barony of Wallingford. And I and my heirs, or whosoever shall hold the barony of Wallingford, will warrant the said lands with the appurtenances to the said Hugh and his heirs, for the faithful service which he has done to my Mother, (the Empress Maud,) and to me. Witness &c.'

Amongst the records of the King's Bench, M. 10 Edw. I. (1281 or 1282) is the following short entry.

"Visum fuit justiciariis de Banco Regis, quorum (*b*) quibus partes fuerunt adjornate, et similiter justiciariis de MAGNO BANCO, qui, ad preces aliorum justiciariorum, presentes erant, etc. Et super hoc venerunt Gilbertus de Thornewton et Willus de Gisellam, *Narratores* (*c*) pro Domino Rege." Here the statement abruptly concludes, which is the more to be regretted, as the compiler goes on to observe,—"*Recordum peroptime placitatur, & in pluribus casibus tangentibus modum seisandi escaetas, tam pro Domino Rege quam pro aliis, sententia justiciariorum redditur ibidem* (*d*)."

In the following record of the King's Bench, in H. 14 Edw. I. (1275-6), a joint judgment appears to have been given by the judges of that Court and those of the Common Pleas.

By writ of certiorari between Felicia, daughter of Nicholas de Whitton, demandant, against Robert de Mortimer and Joyce his wife, for two parts of the manor of Welton, except five acres of land, and nine of pasture, in the same manor:

And against Nicholas de Leigh and Alice his wife, for 30 acres of land and four acres of pasture in the same manor:—it was adjudged by the justices of both benches (*utriusque banci*) that the said Robert and Joyce re-have their seisin (*e*).

But in H. 30 Edw. I., in the King's Bench at York (*f*), we find the following entry. "*Salop. Et Petrus de Corbet dicit, quod placitum de dote est commune placitum, et communia placita non debent placitari in banco isto,*" &c.

(*a*) i. e. the service of a knight for twenty days instead of forty.

(*b*) Sic.

(*c*) Vide post, VII., XXXII.

(*d*) *Abbreviatio Placitorum in Domo Capitulari Westm. asservat.* 274-5

(*e*) *Ibid.* 210 b.

(*f*) *Ibid.* 244 a.

No. III. (a)

Appendix.*Titles recognized by Law.*

The younger son of a duke or marquess, or the younger son of a predeceased heir to a dukedom or marquissate, to whom the crown has granted the rank of a duke's or marquess's younger son, would be designated in legal proceedings as "A. B. esquire, commonly called Lord A. B.;" but this appears to be nothing more than pointing out an individual by a designation which he has assumed, or which he has popularly acquired. In the case of Jack Cade, *namyng hymself, Mortymer, and the Capteyne of Kent* (b),—or, of the Pretender, *taking upon himself the style and title of James III.*—it could hardly be said that the legislature,—or, in the case of Sally (Saartje) Baartmans, *commonly called the Hottentot Venus* (c),—that the Court of King's Bench, had treated these designations as titles recognized by law.

No. IV. (d)

Advocates in Ecclesiastical Courts.

Oughton (*Ordo Judiciorum, in Foro Ecclesiastico-civili. Prolegomena, cap. 2.*) is to the following effect:—

XXIX. But the king's advocate, and the king's proctor, without regard to seniority, take a higher place among their brethren.

XXX. The king's advocate, by prerogative of rank, in all causes before the royal judges-delegates, or elsewhere, wherever his assistance may be required, claims for himself precedence of place before barristers and serjeants of the municipal law of the kingdom: and he, in all places, takes precedence of (superior *astat*) the king's attorney-general himself.

XXXI. And all advocates,—doctors, that is, of the Canon and Roman laws,—have the privilege of priority of place, before counsel of all descriptions from the secular bar, *serjeants at law* being excepted.

And in all causes pending in the tribunals of the judges of the secular bar, or before the Lord High Chancellor of Great Britain, as often as any knotty point arises, and when it seems fitting to them to be assisted by the learning of the

(a) *Ante*, 18.

(b) 5 Rot. Parl. 224 b, 265 a.

(c) 3 East, 195.

(d) *Ante*, 19, 96.

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canon-civil law, (and such doctors are imbued as well with the learning of each law, as with eloquence,) and to call up these same *jura gentium* (a) to their aid, (that thence the thing itself may shine out the more, and with the greater clearness,) the doctors of law, advocates, are always admitted, as a mark of honour, *within* the bar.

XXXIII. But no one may presume to attempt to practise in this *Alma Curia de Arcubus* of Canterbury, without a special licence from the Archbishop, for his undertaking such a task. As often, however, as any doubtful point arises, it may be from the interposition of the municipal law, (the leave of the judge being first asked and obtained,) *jurisconsults*, or counsel, from the secular bar (b), are admitted for the occasion, (*pro hac vice*), in order to inform the mind of the judge.

This second chapter of Oughton's *Prolegomena* has the following brilliant conclusion:—

XLI. Bright therefore be its glory, and may succeeding ages be illumined, far and wide, with the beams of this fostering, this renowned, this most worshipful—Arches Court of Canterbury.

In the controversy between the serjeants and doctors of civil law for precedence at the coronation of James I., the latter urged their right of *sitting* with the judge, as evidencing their superiority to serjeants, who plead *standing* (c). Et doctores *secundum* judice potestatem habent, *nisi hiis* (d) *horis quibus merita causarum panduntur* (e). They also said that in *their* courts a judge is punishable who addresses a doctor as *frater* (f), and not as *dominus*.

No. V. (g)

Chancellor of the Exchequer.

This officer is the chief judge of the Exchequer when sitting as a Court of Revenue or as a Court of Equity (h), but he is not

(a) Manning's Commentary on the Law of Nations, 2. (b) *Ante*, 96.

(c) *Stetit*, however, is the word applied by Master (*post*, XXXII.) John de Maldone, the canonist or civilian, to his own position, (or posture,) in his plea, *ante*, 170. And see Spelman, *Gloss. voce* "Serjeant."

(d) *Quære*, *iis*. (e) As to this exception, *vide ante*, 131, 132.

(f) Where no special character of brotherhood, as in the case of serjeants, existed, "brother" would be naturally considered a term of condescension used by a superior to an inferior.

(g) *Ante*, 23.

(h) But see now 57 Geo. III. c. 18.

a member of the Common Law Court of Exchequer—the Office of Pleas. When the Chancellor of the Exchequer is sworn in, he takes his seat on the bench; some motion of course is then made before him, after which he retires. Whilst this office was held by Sir Robert Walpole, the Court then having only four other members, that statesman actually sat and decided a cause in which the four barons were equally divided (*a*). When there is no chancellor of the Exchequer, the judicial duties of the office are performed by the chief justice of the King's Bench. It appears not to have been unusual to promote a baron, to be chancellor of the Exchequer. Hervicus de Stanton, one of the barons, was made chancellor of the Exchequer (*b*), in 10 Edw. II. (1316). Stanton appears to have been a man of the law, as in T. 18 Edw. II. (1325) we find him chief justice of the King's Bench (*c*), 1 Edw. III. (1327) made chief justice of the Common Pleas (*d*).

No. VI. (*e*)

Clause for opening Common Pleas in Central Criminal Court Bill.

This Bill, as originally brought into the House of Lords, 26th March, 1834, contained no provision respecting Serjeants. A clause was introduced for opening the Court of Common Pleas. This clause, which does not appear to have been printed, and of which no trace can now be discovered, was withdrawn from the engrossment before the Bill was sent to the Commons.

No. VII. (*f*)

Fines acknowledged before a Serjeant.

Lord Brooke says, "Note, per Bromley, C. J. (*g*), and others, that a writ of error was brought in K. B. for that a fine was acknowledged by *dedimus potestatem* before one who was not a judge, abbot, knight, or *serjeant*; and for that cause an acknowledgment taken by such persons is refused to be admitted; for the statute de Finibus et Attornatis gives the power to none

(*a*) But see 57 Geo. 3, c. 18.

(*b*) *Vide* Ryley, Plac. Parl. 558.

(*c*) Plac. in Domo Cap. Westm. asserv. Abb. 362.

(*d*) Dugd. Chronica Jurid. in anno 1327.

(*e*) *Ante*, 24, 135.

(*f*) *Ante*, 24.

(*g*) Appointed, Nov. 1553.

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but justices, abbots, and knights. Quære, whether a serjeant-at-law be not taken as a justice by the equity of the statute." Bro. Abr. *Fines*, pl. 120. And see Lord Coke's Reading on *Fines*, 10.

Where the acknowledgment of a fine was taken by commissioners, under a *dedimus potestatem*, an *allocatur* by a judge was necessary; but where a fine was acknowledged before a serjeant-at-law, no *allocatur* was required, any more than where it was acknowledged before one of the judges of the Court (*a*).

In the statute of 18 Edward I., called *Modus levandi fines*, the serjeant who states to the Court the terms of the concord, is called "le countor;" there translated "the pleader."

No. VIII. (*b*)

Comparative Antiquity of the Privileges of the Peers of England, and of those of the Serjeants at Law.

At common law, those only were peers of parliament who held an entire barony (*c*), a term which, however it may have been originally understood, appears to have been limited, after the 12th or 13th century, to land held of the crown per baroniam, containing not less than $13\frac{1}{4}$ knights' fees (*d*). Every man holding such an entire barony was bound, upon being duly summoned, to attend the king's court, for the purpose of advising the sovereign, and of assisting him in the making and administering of laws. A person to whom a writ of summons (*e*) was addressed, and who had never sat in parliament, might return, that he did not hold an entire barony, or any other matter amounting to a legal excuse, or he might decline to attend, and submit to be fined for his contempt. If he appeared according to the summons, and his appearance was recorded, he was estopped to say, at any subsequent period, that he did not hold a barony at the time of the summons and return. If, in fact, he held a barony at the time he sat in parliament, and afterwards, by licence from the crown, aliened the whole of the barony, or so large a part

(*a*) Hands on *Fines*, 152. (*b*) *Ante*, 25. (*c*) See 2 Rot. Parl. 20 a.

(*d*) That is, land sufficient to support the dignity of 13 knights, and of one-third part of a 14th knight. This fraction arises from a barony being estimated as two-thirds of an earldom, which consisted of 20 knights' fees—Co. Litt. 69 b. A knight's fee was not, as has sometimes been supposed, land of a definite extent or of any fixed pecuniary value. Madox, Baron. Angl. 131 m; Plac. in Domo Cap. Westm. asserv. Abbrev. 33, 50, 63; *post*, No. XXVII.

(*e*) See the form, Co. Litt. 16 a.

of it as would not leave an entire barony in him, he might return the truth upon any summons to attend a subsequent parliament; but as both he and his heirs would be estopped to contradict the record by shewing that at the time of the writ and return, he had no barony, if he never had any barony, he and his heirs would sit in parliament thenceforward *by estoppel*. It is true, that, as the king is not bound by an estoppel (a), it would afterwards be competent to the crown to omit to summon a party who was not in truth possessed of 13½ knights' fees (b); but it would hardly comport with the dignity of the crown thus to recede from its own acknowledgment or concession (c).

At the commencement of the reign of Richard II., a period long subsequent to that to which the existence of serjeants has been carried back (d), the baronage or peerage of England consisted of those few who actually held feudal baronies, with a much greater number who were only barons by estoppel, or by legal fiction. But, at this time, neither the real nor the fictitious baron could sit in parliament without the king's permission; for by a statute of Henry III., which has never been repealed (e), it was ordained, that all those earls and barons of the realm of England to whom the king should think fit to direct writs of summons, should come to the parliament, and no others, unless the king should afterwards choose to direct other writs to them.

The fiction of baronage by matter of record, viz. by writ of summons and return inrolled in parliament, being established, the more simple process of making a baron *per saltum*, by a complete record in the first instance — a record framed for

(a) Bro. *Estoppel*, pl. 106; F. N. B. 142 A, 143 B; 1 Co. Rep. 43; Hob. 339.

(b) Plac. Abbrev. 73 b.

(c) Sir Ralph Everden, knight, brought a writ out of Chancery, (see the writ for recording a baron, Regist. Brev. 287 b,) and also a writ under the privy seal, to the justices, reciting (reherseaunt) that he was a baron, and commanding them to discharge him from being sworn in juries of assise, or in any recognition whatsoever, inasmuch as barons ought not to be sworn in any inquest against their will; wherefore, &c. Belknap (king's serjeant) questioned him (*luy apposa*, — in the Book of Assises, incorrectly, "*opposa*") if he holds by barony, and if he and his ancestors have held, from all time, by barony, and if he has, all his time, come to the parliament, as a baron ought to come; and he said, that he holds by a certain part of a barony, and that he and his ancestors have so held from all time, &c. And afterwards, by good advice, he was entirely (*tout oustrement*) discharged. M. 48 Edw. III. fo. 30, pl. 18. The same case is transcribed verbatim, with three variations, which are evidently mistakes, in 49 Ass. fo. 315, pl. 6. Wolverton's case, 2 Rot. Parl. 19, 20, S. P. And see 22 Ass. fo. 90, pl. 24; H. 35 Hen. VI. fo. 46, pl. 8; Ryley, Plac. Parl. 666. (d) *Ante*, 122. (e) Lord Abergavenny's case, 12 Co. Rep. 70.

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that very purpose—was next resorted to; and we find that Richard II., in the eleventh year of his reign, 10th October, 1387, created John Beauchamp, baron of Kidderminster, by *letters patent* (a). A person to whom a fictitious, or titular, barony is thus granted by letters patent (b), becomes a peer of the realm from the moment at which the great seal is affixed (c); and if he die before any parliament is held, the dignity, if not granted for life only, will descend to his heirs (d); unless, as it would seem, the party, before he has done any act testifying his acceptance of the peerage, disclaim it in a court of record (e).

The privileges of the peers, therefore, (including that most important one of sitting in parliament without the consent of the king, to be expressed *toties quoties* in respect of each individual peer,) so far as those privileges attach to peerages created by letters patent, appear to be of a much more recent origin than those of the serjeants at law; whose existence as an order in the state, and whose rights, have been carried several centuries further back. The existence, and, of course, the privileges of the peers by letters patent, mount no higher than the close of the 14th century; and Richard II. may not unjustly be regarded as the founder of the modern English peerage. The innovation thus introduced by Richard II., though its effects may have long been imperceptible, has, in the course of time, by the successive creation of new patent peerages, brought about a complete revolution in this branch of the legislature.

To an act of power originating probably in mere caprice, we

(a) *Vide ante*, 165, n.; *Rex v. Knowles*, 12 How. St. Tr. 1195; Co. Litt. 15 b, n. 3, 16 a.

(b) In France a different species of fiction was resorted to. Land not amounting to a dukedom, marquise, earldom, &c. was, by letters patent, erected into a dukedom, &c. *in favour* of A. B. (the owner), in other words, it was transformed into a different estate from what it previously had been, or rather, authoritatively declared to be a different estate from what it really was.

(c) See *Rex v. Knollys*, 1 Ld. Raym. 10; Com. Dig. *Dignity*, D.

(d) When the eldest son of a duke, marquess, or earl, is summoned to parliament by his father's barony, the barony by estoppel, acquired by the summons and return, merges in the old barony, if the son survive the father. But if the former die in the life-time of the latter, leaving a daughter, and no son, it would seem that the new barony by estoppel will descend to that daughter, although the old barony may, by virtue of the special limitation in the letters patent of creation, devolve upon the heirs male of the body of the original grantee; and see the case of the Marquess of Tavistock (Baron Howland), *Perry and Knapp*, 143; S. C. 1 Cockburn and Rowe, 95.

(e) See Mr. Smirke's note to *Freeman's Reports*, 503, shewing the necessity of a disclaimer in a court of record to the divesting of an estate of freehold, notwithstanding the sudden decision in *Townson v. Tickell*, 3 B. & Ald. 31; and 4 Mann. & Ryl. 189, n. whereby it appears that the judgment in *Thompson v. Leach*, relied upon in support of the decision in *Townson v. Tickell*, was reversed in the House of Lords.

appear to be in no small degree indebted for that singular constitution under which the greatest political liberty is enjoyed, in a country where the legislative powers of the state are vested in one responsible, and in two irresponsible authorities; the independent, *autocratic*, powers with which the law invests the sovereign, being practically limited by the control exercised by the Commons over the public purse, whilst the *liberum veto* of the Lords is rendered comparatively harmless by the unlimited power of the Crown to create new titular peers (*a*).

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No. IX. (*b*)

Locality of the Court of Common Pleas.

Locus certus, in Magna Charta, c. 11, appears to mean, not one unvarying spot at which a court is to be held, but some known and determined place, though fixed and appointed only during the king's pleasure. Thus, Britton, speaking of the Common Pleas, says, "Voilloms, que justices demurgent continualment a Westminster, ou ailours." In the parliament roll of 26 Edw. I., 1298, is the following ordinance, by the king and council, for the removal of the Exchequer and Common Pleas from *London to York*. "Ordinatum est, quod Scaccarium et Bancus sint apud Eborum post festum Sancte Trinitatis, videlicet, Scaccarium in crastino Trinitatis, et Bancus in Octav. ejusdem: Et quod Scaccarium et Bancus infra castellum: Et quod precipiatur Vicecom', quod si defectus fuerit domorum vel aliorum, quod faciat facere, &c. (*c*). Mention is made of an assise held before Sir William Herle and his companions, in the Common Pleas at York (*d*). So, in *Hind v. Dagworth* (*e*), it appears, that an assise was brought in the Common Pleas, *then sitting at York*, for the office of "Ushery" of the Common Pleas (*f*), and the plaintiff complained of being deprived of his freehold in *York*. Trew, for the defendant, pleaded, in abatement of the writ, that the statute of Westm. 2, c. 25, gives assise of a bailiwick, in an office in certo loco capiendo, but that the Common Bench is not in a certain place, but is

(*a*) See *post*, No. LXX.

(*b*) *Ante*, 28, 45.

(*c*) 1 Rot. Parl. 143 a.

(*d*) 2 Rot. Parl. 399; see also M. 1 Edw. IV. fo. 8. Herle was chief justice from 1328 to 1334, and again from 1334 to 1336.

(*e*) H. 8 Edw. III. fo. 16, pl. 47. And see *Lovel v. Dagworth*, M. 7 Edw. III. fo. 57, pl. 47, and 7 Ass. pl. 12, which seems to be the same case.

(*f*) *Post*, 224.

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sometimes here (at York), sometimes at London, changing according to the will of the king. This plea was overruled, as having been overruled before, probably upon the ground, that *locus certus*, in both statutes, means a place known and certain for the time, and not a place unalterably fixed. Amongst the petitions of the Commons, in 38 Edw. III. 1364-5, is the following (a). “Also, inasmuch as the Bench of our Lord the King is wandering from county to county, through all the realm, and in the counties in which the said Bench is, all the commons of the counties are made to come, and to remain before the justices of the said Bench, for one cause or for another, to the great destruction and costs of the said commons, whereof the king takes but little advantage; and also many persons are thrown back (*susduit(b)*), defeated, and destroyed for want of wise counsel, whereof they can find none in that court (c), by reason of the uncertainty of the place; the commons pray that the said Bench may remain in certain at Westminster or at York, where the Common Bench remains, that a man may have counsel of one court or of the other, so that no man be thrown back (*susduit(b)*) for want of wise counsel, and by the uncertainty of the place. Answer.—The king neither will nor can renounce ordering his Bench where he shall please. But he will order, thereupon, in such manner as shall be best in ease and quiet of his people.” In 15 Richard II. (30th March, 1392,) writs were issued to all the sheriffs of England, directing that all writs, original or judicial, made returnable in the Common Pleas at Westminster, in eight or fifteen days of the Holy Trinity, or on the morrow of St. John the Baptist, should be returned to the Common Pleas at the city of York, on the last of those days; and that the writs having later returns should also be returned at York, and that proclamation should be made through each county (d).

In North's Life of Lord Keeper Guilford, it is said, (vol. i. p. 199,) “The court, answering the title of Common Pleas, was placed next the hall door, that suitors and their train might readily pass in and out. But the air of the great door, when the wind is in the north, is very cold, and, if it might have been done, the court had been moved a little into a warmer place. It was once proposed to let it in through the wall (e) (to be carried

(a) 2 Rot. Parl. 286 a.

(b) *Post*, 268.(c) *Post*, No. LXII.

(d) 3 Rot. Parl. 406 a. These writs are tested at Stamford; but it is not to be inferred that the king was there, it having been formerly usual, as a mark of honour to the lord chancellor, or lord-keeper, to teste original writs as from his place of residence. See North's Life of Guilford (by Roscoe), vol. ii. 144.

(e) This has lately been done, in total ignorance, it may be, of the scruples of the lord chief justice Bridgman.

upon arches) into a back room, which they call the Treasury. But the lord chief justice Bridgman (*a*) would not agree to it, as against Magna Charta, which says, that the Common Pleas shall be held in certo loco, or in a certain place, with which the distance of an inch from that place is inconsistent, and all the pleas would be coram non judice. Although, at the same time, others thought that the locus, there, means the villa (*b*) only (*c*); so that the returns being apud Westmonasterium, the court might sit on the other side of the Abbey, and no solecism of jurisdiction happen. But yet that formal reason hindered a useful reform; which makes me think of Erasmus, who, having read somewhat of English law, said that the lawyers were, doctissimum genus indoctissimorum hominum."

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No. X. (*d*)

Antiquity of Horne's Mirror of Justice.

With respect to the alleged antiquity of the Mirror, see 2 Reeves's Hist. English Law, 358; Barrington's Obs. 1; Phillips's Legal Rights of Courts of Judicature, 268, 280. And see Palgrave's History of the English Commonwealth; Bushell's case, Vaughan, 139. There is a MS. copy of the Mirror in the Harleian MSS. No. 4563, in the British Museum, and in Lord Hale's MSS. in Lincoln's Inn library, No. 127.

No. XI. (*e*)

Serjeant Yaxley—and Form of Special Retainer of a Serjeant temp. H. VII.

John Yaxley and Thomas Frowyk, serjeants, called 10 Sept. 1496; Richard Brook, counsellor, called 10 Nov. 1511.

(*a*) This is the judge distinguished so much by his acrimony, intemperance and inhumanity on the trial of the regicides. His father was bishop of Chester. He was attorney to Charles I. in his Court of Wards, and commissioner at the treaty of Uxbridge (Whitelock, 125.) He retired from practice at the bar during the Rebellion, but on the Restoration was appointed chief baron of the Exchequer. Shortly afterwards he was removed to the Common Pleas, where he, in 1662, gratified his own feelings and those of his employers by a violent extrajudicial attack upon the privileges of the House of Commons, at a period when the House was not sitting, and when there was no cause before the Court requiring the expression of an opinion upon the subject of those privileges.—Benyon v. Evelyn, Bridgman's Rep. 324. He was appointed Lord Keeper on the resignation of Lord Clarendon in 1667, and resigned the Great Seal in 1672, when he was succeeded by Lord Shaftesbury. And see Burnett's Hist. of his own Times, i. 386, 397.

(*b*) The ville or town.
(*d*) *Ante*, 31.

(*c*) Or not so much, *ante*, 179.
(*e*) *Ante*, 32.

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Serjeant Yaxley's name occurs in an indenture bearing date 14 Nov. 12 H. VII. (1496), made between the Bishop of Ely, of the one part, and John Marten, John Boteler, Richard Heigham, Henry Conyngesby, *John Yaxley*, and Robert Constable, serjeants at law, of the other part; by which the bishop, with the assent of the prior and convent of Ely, let to farm to the said John Marten and the other five, all that messuage lately called Grey's Place, (now Serjeant's Inn, Chancery Lane).

The following is a copy of the counterpart of a retainer given to Serjeant Yaxley, by that perpetual, and always unfortunate, litigant, Sir Robert Plumpton, after the reasonable award (*a*) made by King Richard III., as arbitrator between him and the heirs-general of his brother (*b*), had been impugned.

(Chartul. No. 802.)

" This bill, indented at London the 16th day of July, the 16th yeare of the reigne of King Henry the 7th (1501), witnesseth that John Yaxley, serjeant at the law, shall be at the next assises to be holden at York, Nottin. and Derb. if they be holden and kept, and there to be of council with Sir Robert Plompton, knight, (in) such assises and actions as the said Sir Robert shall require the said John Yaxley; for the which premises, as well for his cost and his labour, John Pulan, gentleman, bindeth him by thease presents to content and pay to the said John Yaxley 40 marks sterling (*c*), with V^{li} paid aforehand, parcell of payment of the said 40 marcks. Provided alway, that if the said John Yaxley have knowledg and warning only to cum to Nott. and Derby, then the said John Yaxley is agreed by these presents to take onely XV^{li} besides the said V^{li} aforesaid. Provided alwaies, that if the said John Yaxley have knowledg and warning to take no labor in this matter, then he to reteine and hold the said V^{li} resaved for his good will and labor. In witnesse herof, the said John Yaxley, serjant, to the part of this indenture remaining with the said John Pulan, have put his seale the day and yeare above-written. Provided also, that the said Sir Robert Plompton shall beare the charges of the said John Yaxley, as well at York, as Nottingham and Derby, and also to content and pay the said money to the said John Yaxley comed (*d*) to the said assises at Nott. Derb. and York.

(Copied the 5 of October, 1627, JOHN YAXLEY (*e*)."
having a seal.)

(*a*) Which is set out in the Plumpton Correspondence lately published.

(*b*) As to whom see Cal. Rot. Pat. 318, 321. (*c*) 26*l.* 13*s.* 4*d.*

(*d*) When he shall have come.

(*e*) Plumpton Correspondence, 152 n.

The following cases may throw some light upon the law of retainer, as it was understood in the 15th century.

In Somerton's case, reported H. 11 Hen. VI., fo. 18, pl. 10, P. 11 Hen. VI., fo. 24, pl. 1, and T. 11 Hen. VI., fo. 55, pl. 26, it was surmised by the writ, that the plaintiff, Somerton, had retained the defendant, for a certain sum (*a*), to be paid as agreed between them, to be his counsel (*b*), to buy the manor of A. from John Botiler to the plaintiff, and his heirs for ever, or otherwise to cause him to have a term of years, and that the defendant undertook to buy the said manor, ut supra; yet the defendant, falsely and in deceit of the plaintiff, had discovered his counsel, and had become of counsel with one R., to cause him to buy the said manor, or to have it for term of years; and that, by the defendant's counsel and labour, the said R. had it for a term of years; to the plaintiff's damage. In this case it was held, that if I retain a man of the law to be of my counsel to buy me such a manor, if he do his endeavour, although he procure it not, yet no action lies against him; but that if he afterwards become of counsel of my adversary in this matter against me, an action upon the case lies: but that if there be no retainer, and I shew my evidences to a man of the law, although he after become of counsel to another, and discovers the counsel of the said evidences, yet no action lies against him, because he was not retained. So if there be a retainer, but the retainer is limited to advising upon the evidences (*c*).

In 14 Hen. VI., fo. 18, pl. 58, Paston, Justice of Common Pleas, says, "If you, being serjeant ad legem, undertake to plead my plea, and do not, or do it in another manner than I told you (*d*), whereby I have loss, I shall have my action upon my case" (*e*). So in Doige's case, T. 20 Hen. VI., fo. 34, pl. 4, where the plaintiff had paid the defendant, Doige, 100*l.*, to be enfeoffed within fourteen days of certain land, but of which Doige afterwards enfeoffed another, Stokes, an apprentice, in arguing in support of the declaration which had been demurred to, says, "Suppose I retain one, who is learned in the law, to be of counsel with me in

(*a*) "Pro quâdam pecuniæ summâ solvend' &c., without shewing the quantity of the sum; and yet held good, in 11 Hen. VI., 53 b," as Lord Coke observes, 5 Co. Rep. 35 a, in Playter's case.

(*b*) *Essendi de suo consilio*.

(*c*) And see Bro. Abr. tit. Accion sur le Case, pl. 108; F. N. B. 94 D, note (*b*); 1 Roll. Abr. 91; 1 Vin. Abr. 561.

(*d*) *Vide* The Grand Coustumier, cap. 64; Houard, Dictionn. de Droit Normand, voce, Conteur; *post*, 225, No. XXXII.

(*e*) And see Bro. Abr. tit. Accion sur le Case, pl. 69.

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the Guildhall of London at a certain day ; at which day he does not come, whereby my matter is lost, now he is chargeable to me in an action of deceit." No observation was made by the court upon the supposed case ; but the proposition is cited as law by Lord Chief Justice Rolle (a).

No. XII. (b)

Chaucer—Serjeants-countours—Vavasors.

In the prologue to the Canterbury Tales, the serjeant, who is afterwards (line 4453) addressed as "Sire Man of Lawe," is thus described.

" A serjeant of the lawe, ware and wise,
That often hadde yben at the parvis,
Ther was also, full riche of excellence.
Discret he was and of gret reverence,
He semed swiche, his wordes were so wise,
Justice he was ful often in assise (c),
By patent (d) and by pleine commissioun (d).
For his science and for his high renoun
Of fees and robes had he many on,
So gret a pourchasour was no wher non,
All was fee simple to him in effect,
His pourchasing might not ben in suspect.
No wher so besy a man there n'as,
And yet he semed besier than he was.
In termes hadde he cas and domes alle,
That fro the time of king Will were a falle.
Thereto he coude endite and make a thing,
Ther coude no wight pinche at his writing ;
And every statute coude he plaine by rote.
He rode but homely, in a medlee cote,
Girt with a seint of silk with barres smale ;
Of his array tell I no longer tale."

(a) 1 Roll. Abr. 91 ; and see 1 Vin. Abr. 561.

(b) *Ante*, 32, 72.

(c) *Vide ante*, 23. " By 14 Edw. III. assizes may be taken before any justice of the one bench or the other, or the king's serjeant sworn, which is intended of every serjeant at law."—2 Inst. 422. See Barrington on Stat. 202.

(d) Chaucer here anticipates the decision (*post*, No. LIII.) that a judge of assize can be created by letters-patent or commission under the great seal only.

Chaucer then proceeds to describe the Franklin :

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" A Frankelein was in this compagnie,
White was his berd &c.
At sessions ther was he lord and sire ;
Full often time he was knight of the shire (a).
An anelace and a gipciere, all of silk,
Heng at his girdel, white as morwe milk.
A shereve had he ben, and a *countour*
Was no where swiche a worthy *vavasour*."

Fortescue (De Laudibus, c. 51,) says, " Sed placitantes tunc se divertunt ad *pervisum* et alibi, consulentes cum servientibus ad legem, &c." Ducange says, " PARADISUS, atrium porticibus circumdatum ante ædes sacras, ex gr. *παράδεισος*, qui ab Hesychio definitur *τοπος ἐν τῷ περιπατοί*, locus porticibus et deambulatoriis circumdatus, nostris, vulgo, *parvis*." Both at Westminster Abbey and at St. Paul's there was a *parvis*, at which the serjeants took their walks and saw their clients. And see Kelham's Norman Dictionary, in verbo.

As to countours, see *ante*, No. I., *post*, No. XIII.

Vavassor (valvassor) is a term applied in the antient records of England and Scotland, as well as those of France, Lombardy and Aragon, to all feudatories who did not hold *per baroniam*, or immediately of the king, *jure coronæ* (b). Thus, Francis de Bohun, in the time of Richard I. (c), was seised of two honours, one that of Bohun in Normandy, which he held of the king (as duke) *per baroniam*; the other in England, consisting of the manor of Fordes, &c. in Sussex, which he held *in vavasseria* (d). The term "vavassor" appears to have included as well those freeholders who held of a baron—as of his castle or manor, as those

(a) Knights of shires are frequently styled "magnates" and "grands" in ancient records, Petyt, Jus Parliam. 94; Scriptores post Bedam, 189; Tyrrell, D. 6, and Appendix. But as the term magnates is more frequently applied to peers and the great officers of state, Prynne has denied that knights of the shire were included under the title of magnates, even where the expression in the parliament roll is, *proceres et magnates*. See Cotton's Records, by Prynne, 11, 12.

(b) Bracton, 93 b; Ducange, in verbo.

(c) Abbr. Plac. in Domo Cap. Westm. asserv. 88. In the next reign Alice Briewere claimed Plimtree in Devon and Depeworth in Somerset and Dorset, assigned to her by her late husband Roger de Pole, on the day he set out for Jerusalem, *pro plenaria tertia parte trium vavassurarum, scil. pro vavassuris comitis de Salesb. et comitis de Vernon, et de vavassura comitis Witti de Mohun*. (i.e. vavassories held under these noblemen). Ibid. 61 b.

(d) Hence it would appear that an honour was not necessarily a barony. *Vide tamen* Madox, Baronia Anglicana, 3, 5, &c.

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who held of him—as of his person, or in gross, provided they held by knights' service, which appears to have been a necessary qualification, as we nowhere find vavassories spoken of in such a manner as to lead to the supposition that they might be held in socage. Whether all the military tenants of a baron were vavassors, or whether the term was applied exclusively to a particular class of those tenants, it may be difficult now to ascertain. A vavassory might be a seignior in gross, or it might be a manor, or, as in Bohun's case (*a*), an honour; but it seems to have been always a mesne seignior, requiring the existence of subordinate freeholders, as subtenants, to support it (*b*).

Valvassores are mentioned in a law of the Lombards (*c*), intitled, Conradus Imperator (*d*). Those knights, who held immediately of bishops, abbots, abbesses, marquesses, counts, or others holding immediately of the crown, are there designated as valvassores majores. The valvassores minores of this law appear to be those who held of the valvassores majores (*b*).

In the laws of William the Conqueror (*e*), the relief due from a vavassour to his liege lord is defined (*f*).

In a charter of Henry I. "de tenendis comitatibus," it is said, "Si exurgat placitum de divisione terrarum, si inter est barones meos dominicos, tractetur in curiâ meâ; si inter valvassores duorum dominorum, tractetur in comitatu" (*g*).

In the Great Roll of the Pipe, of 31 Henry I. (formerly assigned to the 5th of Stephen), referred to by Madox (*h*), and which has been lately published by the Rev. Joseph Hunter, mention is made of the vavassors belonging to the barony (*i*) of the Archbishop of York, and of those belonging to the ba-

(*a*) See the preceding page.

(*b*) Wilkins, *Leges Angl.* 247.

(*c*) Lib. 3, tit. 8, l. 4, Lindenbrog.

(*d*) Probably promulgated by Conrad II. in 1037, after the reduction of Milan. See Schmidt, *Geschichte der Deutschen*, 3ten Band.

(*e*) And see Cujas, *Feudor.* lib. 1, tit. 1; Cujacii Opera, vol. iii. 1762; Hotomann. *Feudor.* lib. 3, cap. 3.

(*f*) Ibid. 223; Kelham, 40. Persons holding in fact in vavasseriâ are described, at this period, by the Anglo-Saxon designation of "Theoden," or as "Mediocres Thaini."—Kelham, 41 a. As to *theinage*, see 2 *Mad. Exch.* 707 (*h*).

(*g*) Spelman on *Parliam.* 57. In *Spelm. Gloss. in verbo*, and Wilkins, *Leges Angl.* 247, the language slightly varies from the above. From both these authors it would appear, that the suitors of the county court were not necessarily the king's immediate tenants. This charter also points at the distinction between barons and vavassors. In the laws of Henry II. the jurisdiction of "vavassores" is specified. They are twice mentioned in *Domesday-book*, pp. 63 and 1466.

(*h*) *Dissertatio Epistolaris de Magno Rotulo Scaccarii, per totum; Baronia Anglicana*, 136.

(*i*) The territorial possessions of the higher clergy appear to have been converted into baronies soon after the Norman Conquest. Whether the prelates

rony of Robert Fossard. Madox also sets out a writ (a) addressed to all barons and *vavassors* who owe service of castle-guard at Rockingham Castle, requiring their residence, or constant attendance, there.

In the "record and process of the renunciation of Richard II. &c., that prince absolves all dukes, marquesses, earls, barons, knights, vassals, and *vavassors*, and other his liege men, from their oaths of fidelity" &c. (b) Here the barons would be those who held of the king, per baroniam—by an entire barony (c) or more; the king's vassals would be as well those who held of him per baroniam, but by less than an entire barony, and who were therefore not barons of the realm, as those who held of the king, in chief, lands &c. which never formed part of a barony; and *vavassors* would be those who held of such barons or vassals.

sat in the Aula Regia by virtue of their baronies, or as the heads of the first of the three estates of the realm, is a question involved in considerable obscurity. Upon the former hypothesis, the Aula Regia would have been an assembly, not of the *estates*, but of the *baronage*, of the realm; and the parliament, which succeeded that body in its legislative capacity, would be properly considered as consisting of the tenants of the crown divided into four classes,—spiritual men, holding by entire baronies,—laymen, holding by entire baronies,—laymen, holding in chief, but by less than an entire barony, and therefore attending parliament, not individually but per comitatus,—and incorporate boroughs, holding in chief and attending parliament by *burgesses de seipais*. This would supply a reasonable explanation of the fact, that the barons, knights, and *burgesses* in the bishopric of Durham (until 25 Car. 2, c. 9), and the county palatine of Chester (until 34 & 35 Hen. 8, c. 13), were not summoned to parliament; and that freeholders who held, not immediately of the king, but of the barons who came to parliament, were not contributors to the wages of the knights of the shire. (2 Rot. Parl. 218 b; 3 Rot. Parl. 25 b, 293 b; 2 Plac. Abbr. 258; 2 Rich. II. Prynce, Parl. Writs, 4th part, 329, 483; Vin. Abr. tit. Ancient Demesne.) But, according to this theory, England would be the only feudal nation which had no assembly of the three estates; whereas the parliament is frequently spoken of as a court in which the king convenes the three estates of the realm, as such. (Rot. Parl. passim (see the Index); Cott. Rec. 10, 14, 320, 425, 709, 712, 713, 714.)

It may not be out of place here, to notice an error into which political writers and parliamentary speakers sometimes fall, in speaking of the king, lords, and commons, as the three estates of the realm; the three estates in this, and in every kingdom of Western Europe, having always consisted of the clergy, the nobility, and the commons; of and over all which three estates the king is not a member, or co-estate, but the head. And see Plac. in Domo Cap. Westm. asserv. Abbrev. 5; Rot. Parl. ii. 64—69, iii. 357; 4 Inst. 1; Mad. Bar. Angl. 6; Bac. Abr. *Prerogative*.

(a) Baronia Anglicana, 135 (h). The writ is without date, but the royal style clearly points to Henry II., as does the teste, "Toma, (St. Thomas a Becket,) Cancellario."

(b) 3 Rot. Parl. 416. And see Heywood, Dissert. upon Distinctions, 225, 226, 227.

(c) *Ante*, Appendix, No. III.; 2 Rot. Parl. 20 a.

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It appears from a passage in Arnulphus, cited by Ducange, that "urbium milites" were called "walfassores." Hence, it seems not improbable, that the original designation was wall-vassal, a vassal holding by the service of guarding the walls of a castle, *i. e.* by castle-guard (*a*): or possibly the word may have been, wallfasser, *i. e.* supporters, upholders, or defenders of walls (from *wall* and *fassen*); and the vassals of the barons may have acquired this designation from the duty which devolved upon them, of defending the walls of those castles of their lords-at which their services were reserved (*b*).

No. XIII. (*c*)*Apprentices at Law.*

That apprentices at law, and attorneys at law, constituted formerly one class, appears from the injunction to John de Mettingham (*d*), and also from the following petition.

"To our lord the King, and his council—shews John de Codnyngton (*e*), an apprentice of the court (*f*) of our lord the king, *and attorney*, that whereas the said John has no lands or tenements, and never was armed for peace or for war, Sir (Monsieur) John de Ros, admiral of our lord the king, by procurement, has commanded him that he be well and completely (*bien et nettement*) armed and apparelled as a man at arms, at Orewell, on Wednesday, the 17th day of March; and that, upon pain of being hanged (*g*); and if he come not, to proclaim (*h*) that he is a rebel, and to cause him to be attached and sent to the next gaol; which would be in disherison of his clients for whom he is attorney, and in destruction of himself (*i*); whereof he prays remedy."

Answer.—"Inasmuch as it is testified before the council that he is an attorney, let it be commanded to Sir (Monsieur) John de Ros, or his lieutenant, that they surcease from the demand which they make against him, and from the distress which they do to him, for this cause (*k*)."

(*a*) As at Rockingham Castle, *suprà*; and see Spelman, Gloss. *Vavassor*.

(*b*) See *Dive v. Dive*, Plac. in Dom. Cap. Westm. Abbr. 39, 44.

(*c*) *Ante*, 32. And see *Lovel v. Dagworth*, M. 7 Edw. III. fo. 57, pl. 47.

(*d*) *Ante*, 11, 45.

(*e*) Clerk of the parliament, 25 Edw. III.

(*f*) *Quere*, the mode in which an apprentice became admitted or attached to the court. *Vide* 5 Reeves, Hist. Engl. Law, 246, 248.

(*g*) Et ceo sur peyne de la hard (la hart, the halter.)

(*h*) Assigner.

(*i*) Anientisement de luy.

(*k*) Petitions in Parl. 11 Edw. III. (1337), 2 Rot. Parl. 96 b; Ryley, 658.

In the following reign, in a subsidy, granted 2 Rich. II. (1379), we find the following assessments (a) : Appendix.

Also every justice, as well of the one bench and the other, and those who have been justices of those benches, and the chief baron of the Exchequer..... each	100s. (b)
Also, every serjeant and great apprentice at law (grant apprentice du ley)..... each	40s.
Also, other apprentices who follow (c) the law..... each ..	20s.
Also, all the other apprentices of less estate, and attorneys, each	6s. 8d.
Also, every serjeant and franklin of the country, according to their estate	6s. 8d. or 40d.

In 5 Rich. II., 1381, the Commons pray that two justices, two serjeants, and four apprentices at law, be appointed to inquire into grievances from delays in law, &c. (d), and at the same parliament, it was ordered that "as well the clerks in chancery of the two principal degrees (e), justices and serjeants, and all the barons and great officers of the Exchequer, and also certain persons of the best apprentices of the law, shall be charged by their allegiance and by oath, each degree by itself, to advise themselves diligently of the abuses, wrongs, and defaults, &c. done or used in their respective "Places," and in the king's courts, and also in the courts of other lords throughout the realm, &c. (f).

In 7 & 8 Hen. IV. (1406) a bill was presented to the Commons for certain restrictions upon dress, and particularly upon hoods (chaperons): "Provided always, that the justices of one bench and the other, and the king's serjeants, may (g) use their hoods (h), as seeming to them best, for the honour of the king, and of their estate;" but it is provided that no esquire, apprentice at law, clerk of chancery, or of the exchequer, or of other places of courts, or within the king's hall (i), or abiding with other lords of the realm, not being advanced, should use furs of grey, &c. (k)

No. XIV. (l)

Exemption of Serjeants from the burthen of Knighthood.

By the common law, all those who held freehold land to the

- (a) 3 Rot. Parl. 58.
 (b) Which is five times as much as was paid by a baron.
 (c) Pursuant, i. e. practise. (d) 3 Rot. Parl. 101 b.
 (e) Master of the Rolls and Masters in Chancery, ut videtur.
 (f) 3 Rot. Parl. 102 b. (g) Purront.
 (h) In Strutt's Antiquities is represented a serjeant in the robes &c. of the 15th century. (i) Deinz le tinel du roy.
 (k) 3 Rot. Parl. 593 a. (l) Ante, 32, 81.

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extent of a knight's fee (a), were compellable on their arriving at a proper age, to take upon themselves the burthen and duties of knighthood, and to prove by their reception into that order, that they had received a knight's training, and were possessed of the armour, equipments, and other requisites, necessary to enable them to take the field, as knights. The statute of 1 Edw. II. *De Militibus*, declares those persons liable to be distrained ad arma militaria suscipienda, who possessed 40*l.* a-year rent. The number of persons compellable to receive knighthood, having, upon the adoption of this pecuniary standard, necessarily increased with every debasement of the currency, the crown was enabled to derive a revenue from the anxiety of the little freeholders to be excused from so burthensome an honour. This species of legal extortion was practised by Edward VI. and Elizabeth; but upon its being reduced into a system by Charles I., and resorted to as a mode of obtaining supplies without calling a parliament, the undisguised and oppressive manner in which this antient prerogative was enforced, led to its total abolition, by 17 Car. I. c. 20 (b).

But serjeants at law, being bound to hold themselves ready to assist the king and the people in a particular branch of the public service, were always exempt from this liability (c). Dugdale, says (d), "It seems that those of this degree were not antiently made knights; for I finde that Thomas Rolfe, a serjeant at law, in 9 Henry VI., being then summoned to receive the order of knighthood, and for his not appearance like to be fined, pleaded his privilege, viz. that he was a serjeant at law, and bound to attend the court of Common Pleas, and not elsewhere. And that none of that degree were knights before the 26 Hen. VIII. appeareth by this memorial. 'Memorandum, quod Term. Trin. 26 Hen. VIII., Thomas Willoughby et Johannes Balwin, Serjeants le Roy, furont faits Chivaliers, et que nul tielx Serjeants devant fuere unq; faitz Chivaliers (e).'"

11 Henry VII. cap. 18, it is enacted, That all persons having offices, fees, or annuities by any of the king's gifts and grants, who do not attend the king in his wars, as therein mentioned, not having the excuses there allowed, shall forfeit the same; but there is a proviso exempting from it any spiritual person, master of the rolls, or any officer or clerk of the chancery, justices of

(a) *Vide ante*, 176; Plac. Abbr. 73 b. (b) And see 5 Rot. Parl.

(c) *Post*, LVII. (d) Dugd. *Origines Juridicales*, cap. 51; *ante*, 81.

(e) *Ex amplo et vet. MS. vocat. Spelman's Reports*, nunc penes Clem. Spelman de Grayes Inne, Arm. an. 1663, Dugd. *Origines Jurid.* c. 51, p. 137.

either bench, barons of the king's exchequer, and other officer, and clerks of the said places, the king's attorneys and solicitors, Appendix.
and the serjeants at law (a).

No. XV. (b)

Oath of a King's Serjeant at Law,—antient Form of his Appointment,—and antient Mode of Remuneration.

"This oath," says Lord Coke (c), "consisteth on six parts.

"1. That he shall well and truly serve the king and his people, as one of the king's serjeants at law.

"2. That he shall truly counsel the king in his matters, when he shall be called (d).

"3. And duly and truly minister the king's matters, after the course of the law, to his cunning.

"4. He shall take no wages or fee of any man, for any matters where the king is party, against the king (d).

"5. He shall as duly, as hastily, speed such matters as any man shall have to do against the king in the law, as he may lawfully do, without delay, or tarrying the party of his lawful process in that belongeth to him (e).

"6. He shall be attendant to the king's matters when he shall be called thereto" (d).

Lord Coke adds, "The apprentice at law is not sworn."

Appointment of King's Serjeants.

De Serviente Regis constituto. } Rex omnibus ad quos &c. salutem: Sciatis, quod statim post mortem carissimi Domini Nostri, Edwardi, nuper Regis Angliæ, Avi Nostri, defuncti, dilectus Nobis David Hanmere, ex voluntate et assensu Nostris, extitit electus, et per Nos ordinatus, essendi unus servientium legum Nostrarum, et narrator pro Nobis, in curiis Nostris, in

(a) Who were therefore persons "having offices (post, No. XVII.), fees, or annuities."

(b) *Ante*, 34.

(c) 2 Inst. 214. Lord Coke gives also the oath of the serjeant at law, which see *ante*, p. 14. If the party be afterwards discharged from the office of serjeant, it is said that he may be absolved from his oath by the bishop, T. 20 Hen. VI. fo. 37, pl. 6, per Newton, C. J. of the Common Pleas.

(d) *Ante*, 139, n.

(e) This is a remarkable clause, and appears to reflect no little credit on those advisers of the crown by whom it was first introduced into the oath.

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quibuscunque negotiis Nos tangentibus &c. percipiendo pro dicto officio feodum consuetum (a).

Payment of King's Serjeants.

King's Serjeant at Law. } The king to his collectors in the port of
Bristol, &c., Whereas We constituted Richard Chek to be one of Our Serjeants at Law, for so long time as We should think fit, receiving the accustomed wages and fees &c., We command you to pay to the said Richard the arrears of the fees and sums of money in each year, and that in each future year you pay the said fees and sums of money (b).

No. XVI (c).

Serjeants, not to be impanelled in a Grand Assise (d).

Dugdale says (e), that serjeants (meaning serjeants at law) were specially exempted from serving on the grand assise, except where there were no knights in the county. But on looking into the authorities referred to by Dugdale, it appears to be clear, that they apply to another description of serjeants, unconnected with the profession of the law. In M. 22 Edw. III., fo. 18, the four knights were told by the judge, that they should elect no serjeants whilst they could find suitable (covenable) knights. In H. 26 E. III. fo. 57, pl. 12 (f), the four knights were sworn to elect the grand assise; and it was commanded that they should choose sixteen knights of themselves and others. They went, and afterwards said, that they could not elect so many knights in the county; and they were told, by the assent of the par-

(a) "David Hanmeare, ex voluntate regis, electus est, et per regem ordinatus, essendi unus servientum legum suarum, et narrator pro rege in curiis suis quibuscunque, ad placitum regis." Rot. Pat. 197 b. 1 Richard II. (1377). Hanmer was one of the king's serjeants consulted in parliament in 2 Richard II. (1379), by the executors of Edw. III. respecting the operation of a feoffment, 3 Rot. Parl. 61,—justice of K.B. 1383 (Dugd. Chronica Series, 107),—a trier of petitions in 1383 (3 Rot. Parl. 151 a), twice in 1384 (Ib. 167, 185), in 1385 (Ib. 204), and in 1386 (Ib. 126).

(b) Claus. 33 Hen. VI. And see Cotton's Records, 603, 623, 695; 5 Rot. Parl. 13, 14.

(c) *Ante*, 35; *post*, 220; 2 Mad. Exch. 705.

(d) Plac. in Domo Cap. Westm. ass. Abbr. 99, 100, 101, 226.

(e) Origines Juridicales, cap. 41, pa. 110; *ante*, 35.

(f) Dugdale also refers to the same case, as abridged by Fitzherbert; Fitz. Abr. Droit, pl. 37.

ties (a), to elect of the most wealthy (b) serjeants; and so they chose, of themselves three, and the remainder, of serjeants. It cannot be supposed that, in a county where there were few knights, there should be no difficulty in selecting thirteen from the most wealthy serjeants *at law*. In both cases the serjeants would appear to be those freeholders who, holding by military *service*, were bound to *serve* as men at arms, though not knighted, and in most cases not holding so much land as to raise the obligation of accepting knighthood (c).

(a) The assent seems to be unnecessary.

(b) Des multz vaillantz.

(c) In the laws of William the Conqueror, L. 58, (Kelham,) we find “*Statuimus etiam et firmiter precipimus, ut omnes comites, et barones, et milites, et servientes, et universi liberi homines, totius regni Nostri, habeant et teneant se semper bene in armis et in equis, ut decet et oportet.*” In the *liberate* rolls in Chancery, directing the payment of salaries &c. from the crown,—which, as well as the corresponding *issue* rolls in the Exchequer, (containing minutes of the actual payment thereof,) are extant from 6 Henry III. (1221),—are such entries as these. 6 Hen. III. *Liberate* &c. W. C. *servienti* Nostro, et (naming others) *balistariis* Nostri. “Pray the Commons that henceforward no simple knight or *serjeant* be charged with commissions that require account, unless some great man, together with the sheriff of the county, be joined therein, to whom the people will be more obedient. *Answer.* It pleases the king to assign such commissions to such persons as are sufficient to do it, for his profit and for the ease and profit of his people.” P. 17 Edw. III. 2 Rot. Parl. 140 b. Here the country serjeants are intended, not serjeants at law, who were not only capable of such commissions as these, but of commissions of assise, &c. And see 2 Rot. Parl. 331 b, where commissions are directed to issue only to justices, serjeants, and others knowing the law, who are persons sufficient and of good fame. In the Parliament, 46 Edw. III. (1362), the following Ordinance was made. “Inasmuch as men of the law who pursue divers businesses in the king’s Courts for private (singulers) persons, with whom they are, procure and cause to be presented (font mettre) many petitions in parliament in the name of the Commons, which in nothing touches them, but only the private persons with whom they are retained (demorez),—also sheriffs, who are common ministers to the people, and ought to remain upon their office to do right to every one, are named and have been heretofore returned in parliament knights of the counties by the same sheriffs,—it is agreed and assented in this parliament that no man of the law, pursuing businesses in the king’s courts, nor sheriff for the time that he is sheriff, be returned or accepted knights of the counties, nor that those who are men of law and sheriffs now returned in parliament have wages,—and the king wills that knights and *serjeants* of the most value of the country be returned henceforward knights in parliament.” Ruffh. App. 43.

Those among this description of serjeants or military tenants, who from their rank, property or inclinations, expected to be called upon to receive, or sought to attain, the honour of knighthood, would often be placed by themselves, or their friends, under some knight of their family or neighbourhood, in the capacity of *esquire*. As the esquires would constitute a superior class amongst the country serjeants, the title would, in the ordinary course of things, be given to, and assumed by, those who were not serving, and even those who never had

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In 38 Henry III. the serjeanty of Robert de Langeford in Thornhull, pertaining to his manor of Tyderlegh (Titherleigh), in the county of Southampton, for which he ought to find in the king's army in England and Wales one serjeant horseman armed (unum servientem equitem armatum) for forty days, at his own cost, was found to be aliened in part (a).

No. XVII. (b)

A Discharge of the State and Degree, and from the OFFICE (c) of Serjeant at the Law, to Thomas Fleming, then made the Queen's Solicitor-General (d).

Elizabeth, &c. To Our trusty and well beloved subject, Thomas Fleming, serjeant at the law, greeting. Whereas We are minded, and do intend, otherwise to inaploy you in Our service: Know ye, that We, as wel in consideration thereof, as for divers other good causes and considerations Us moving, of Our especial grace and mere motion, have acquitted, released, and discharged, and, by these presents, do acquit, release, and discharge you, *of and from being any more from henceforth Serjeant at Law, and of the name, title, and degree of Serjeant at Law*, and of and from all attendance and service, that you should or ought to give, or do at any time or times, or at any place or places, for or by reason of your being serjeant at law, or by reason of the said OFFICE (b), state, or degree of serjeant at law. And also We release and discharge you for wearing of any quoif, and of and from the wearing of all other apparel, garments, vestures, and habits, that, by the laws and customs of this Our realm, ye should or ought to wear or use, for that ye were or be serjeant at law, and generally of and for all other things whatsoever, that ye, by any manner of means, ought or are bound to do, use or exercise, by reason ye were or be serjeant at law; as clearly and freely, to all intents and purposes, as though ye never had been serjeant at law, or had never taken upon you the OFFICE, state or degree of serjeant at law; any statute, law, custom or

served, as esquires; and Selden says that the term serjeant began to grow out of use about this time, and the title of esquire succeeded. (Titles of Honour, 2d edit. 832.) Some are of opinion that by servientes, in the Laws of William the Conqueror, are meant those who held by grand or petit serjeanty. Kelham, 84.

(a) Plac. in Dom. Cap. Westm. Abbr. 185 a. See *post*, Nos. LXX, LXXI.

(b) *Ante*, 37.

(c) *Ante*, 65, 77, 81, 82, 186, n.

(d) See the discharge of Serjeant Rokeby, *ante*, 36.

use, had, made, or used to the contrary, notwithstanding. Witness, Ourself, at Westminster, the 5th day of November, in the 87th year of Our reign (a).

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Neither Fleming nor Rokeby (discharged from the office of serjeant at law (b) by Queen Mary) were queen's serjeants. Fleming was discharged from the office of serjeant in order that he might be made solicitor-general; as barristers are sometimes disbarred to enable them to practise as attorneys. Such coups d'état as those of 1814 and 1834 do not appear to have suggested themselves to Queen Elizabeth or her ministers.

No. XVIII. (c)

Trial by Jury of Experts (d)—Issue upon the Law-Merchant, tried by Jury summoned from London, Lincoln, Winchester, and Northampton.

The abbot of Ramesey and Andrew, the monk, (bailiff of the said abbot (of his town) of St. Ives,) were attached to answer Simon Dederit, burgess of the town of Guynes (e), of a plea, wherefore, whereas the said Simon had sent over his own goods and merchandizes to the value of 40*l.*, by Eustace Everwin, his valet and servant, to the said abbot's fair of St. Ives (f), to be traded with there, the said bailiff had attached them at the suit of William de Finchingfield, on pretext of debt (in which the same Eustace said he was not bound), notwithstanding that the same

(a) Dugdale's *Origines Juridiciales*, cap. 54, p. 140.

(b) See the discharge of Serjeant Rokeby, *ante*, 36.

(c) *Ante*, 42.

(d) As to a jury of attorneys, &c., see Tidd, 9th ed. 88.

(e) In the Marches of Calais. *Vide* Rot. Parl. Index.

(f) In the preface to the Rev. Joseph Hunter's late publication, "*Fines et Pedes Finium*," mention is made of five ancient fines of the first three Plantagenet kings, which have been preserved, and are there set out. The fines of the reign of Henry II., as well as those of Richard I. and John, shew that the severance of the Aula Regia had not taken place. One of these fines relates to a fair belonging to the Abbot of Ramsey, which appears to be that referred to above.—Thomas de Santon to the Abbot of Ramsey—"de totâ terrâ quam habuit in feriâ Sancti Ioonis, in euriâ domini regis apud Westmonasterium, die Jovis proximâ post festum Sancti Marci Evangelistæ, coram R. Winton. et J. Norwic. episcopis, Ran. de Glanvilla, justiciar. domini regis, et Ricardo thesaurario domini regis, et Rogero filio Reinf. et W. Ruffo, et Thom. filio Bernard. et Will^o Basseth, et Mich. Belet, et Will^o Torel. et Osborn de Glynn, et Will^o de Abbervill, et Raual. de Gedd, et Gerveis de Cornhill, et ceteris baronibus et fidelibus domini regis qui tunc ibi aderant." *Et vide ante*, No. VII.

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Eustace asserted that he had no part in those cloths and merchandizes, and offered himself ready to verify it: afterwards the king, by writ, commanded the abbot and monk, that if it should appear plain to them that Eustace had no part in the goods, &c. he (the bailiff) should deliver them up to him: yet the aforesaid abbot, the king's commands being set at nought, ordered the aforesaid goods to be valued, and according to such valuation to be delivered to the said William &c. Who say (i. e. the abbot and monk plead to the action) that the aforesaid Eustace was duly convicted of the aforesaid debt; and because the said Simon, during the markets, did not come to claim and prove the said cloths, the said Andrew, the bailiff, delivered to the aforesaid William those cloths (which had been valued by merchants, sworn for the purpose, at 19*l*.) according to the valuation aforesaid, in part payment, according to the law-merchant; and this before any writ came to them from the lord the king, &c. And the said Simon says, that the law-merchant is such in all and each of the fairs through the whole kingdom, that if any goods and merchandizes belonging to any alien trader, and brought from a foreign land, be arrested, and he, in whose custody the merchandizes so arrested were, alleges that those goods and merchandizes are not his own, nor any part of them, and that he claims nothing except as servant, the goods ought to remain under arrest, in custody of the lord of the fair, until the fair of the same place in the following year; and if he who has the property in the merchandizes arrested, do not come, within the time of their fair, to claim and prove the merchandizes to be his own, then, at the end of that fair, they ought to be put in execution &c., and in no other manner; and that such is the law-merchant, he is ready to verify. And Andrew says, that the law-merchant is of this nature,—that if any merchant, as well alien as denizen, be impleaded, for any debt, in any fairs &c., and be convicted, although he assert that the merchandizes attached in his custody are not his own, nor any part &c., yet unless he, whose property he asserts it to be, shall come during that fair, the merchandize ought to be immediately valued and execution had thereof, without any delay. And this he is ready to verify, by merchants (a). And the said Simon, likewise. Wherefore it is com-

(a) In a charter to the city of London, 26 March, 52 Hen. III., the king grants that the citizens shall not plead without the walls except (*inter alia*) in pleas concerning merchandize, "which are wont to be decided by law-merchant in the boroughs and fairs, by four or five of the citizens there present." Norton's Comm. 416. And see 1 Rot. Parl. i. 460 a; ii. 250 a, b.

manded to the sheriffs of London, Lincoln, Southampton and Northampton, that each of the said sheriffs cause to come before the king, 12 good and lawful merchants from his bailiwick, viz. the sheriffs of London, 12 of London,—the sheriff of Lincoln, 12 of the city of Lincoln,—the sheriff of Southampton, 12 of the city of Winchester,—the sheriff of Northampton, 12 of the town of Northampton, by whom &c., to recognize &c. (a)

Appendix.

No. XIX. (b)

Statutory grants, &c.

Considerable doubt exists as to what proceedings, entered on the Parliament Roll, are to be considered as having the same binding efficacy as a statute. Formerly, besides the roll called the parliament roll, there was another separate roll called the statute roll, the former consisting of contemporaneous entries or minutes, a procès-verbal, of what was transacted in parliament, containing, amongst a variety of other matters, the petitions of the commons, and the king's answers. Where the king granted the prayer of the commons, wholly, partially, or with modifications, (by the advice and with the consent of the two other estates, the prelates as representing the clergy, and the lords temporal in their own right,) it was drawn up in form by the judges, and entered upon the statute roll, and was sent by writ to the sheriffs of the different counties, to be proclaimed at the county courts. The judges, in preparing the statute roll, sometimes caused entries to be made which were not warranted by the parliament roll (c). This is said to have been the reason for altering the manner of framing laws into that now in use (d). The first two charters to the Black Prince, relating to the Duchy of Cornwall (e), purport to be "per ipsum regem et totum concilium in parlamento." These charters have been held to have the effect of statutes (f). The third charter (g), was not made in parliament, but all three charters were to a certain extent confirmed in parliament, 38 Hen. VI. 1459 (h).

(a) T. 8 Edw. II. (1315), coram rege. Plac. in Dom. Cap. Westm. 321.

(b) *Ante*, 45.

(c) See *post*.

(d) 16 Howell, State Trials, 1388, 1389, 1390. And see Cotton Rec. 458.

(e) Translated at length in the Appendix to the report of *Rowe v. Brenton*, 3 Mann. & Ryl. 474, 482.

(f) The Prince's case, 8 Co. Rep. 15; Farrar's case, cited Skinner, 78. Rot. Orig. in Scacc. 246, b, 247, b. But see 2 Reeves, Hist. Engl. Law, 904.

(g) 3 Mann. & Ryl. 488.

(h) 5 Rot. Parl. 366.

No. XX. (a)

Jurisdiction of the King's Bench in a Real Action (b), as incident to a cause removed into that Court for error.

Afterwards the said Robert comes, and shews a certain bill (c) in these words: Robert de Tylberg says, that he ought not to answer before you to the plea of warrantia cartæ, which is a common plea, unless, for a certain cause, authority were given to you *by writ* obtained (d) before you; because this is contrary to the form of Magna Charta, in which it is contained, that common pleas be held in a certain place, that is, in banco (e); and he prays judgment, since that plea remained in banco sine die until the coming of age of the said Robert; and there no judgment was given, whether he ought to answer to that plea, since that plea yet depends whole and undetermined in banco. And the said Peter says, that the said exception ought not to avail him, because such an exception ought to be proposed in the beginning of an action, and not after one has consented to his judge, and has answered in chief. And he prays, that inasmuch as the said Robert does not now care to use the said answer, that he shall not be admitted to propose the said answer at another time. And he prays judgment against him, as undefended.

And it appears to the judges, that the lord the king has granted to them (f) the authority of taking cognizance as well of warrantia, as of the principal plea, in this, that, by the precept of the king, they have before them process and cognizance of the said plea had between Robert de Vere, Earl of Oxford, and the said Peter, which was pleaded before the king himself, which ought to be called a principal plea. And besides, by precept of the king, they have process of warrantia cartæ, had before the judges de banco; so that the said judges de banco henceforward are not enabled to take cognizance of warrantia, since the said process is sent before the king; wherefore it would be more convenient that such plea of warrantia, which is incident to the said principal plea had before the king, should be pleaded in Curia

(a) *Ante*, 47, 92.(b) *Warrantia Chartæ*.(c) *Billetum*.(d) Made returnable, *semble*. The words are, "per breve ceram vobis impetratum."(e) *Ante*, 179, *post*, 199.

(f) By the commission contained in the writ of error.

Regis, rather than elsewhere. For our lord the king, who is the supreme judge, is able to do this without offence of law. Nor does it create any difficulty, that he says, that if any one implead another in the county-court or court-baron, by writ of right, or by any other writ, and when the tenant shall have purchased a writ of warrantia cartæ against the feoffor, before the justices de banco, or before the justices itinerant, and when the feoffor shall have warranted, and when it is said that he should go to the county-court or court-baron, and there warrant and defend his own tenant, yet it is not found, on reaching past times, that when a plea principal, and a plea of warrantia, which is incident to it, were before the justices de banco, or before the justices itinerant, or before the king himself, but that then the plea of warrantia as well as the plea principal, were able to be terminated before the same justices, in the same judgment.

And as to its being said, respecting this, that there is a provision in Magna Charta, that common pleas shall not follow the king himself, but be held in some certain place (*a*), this is to be understood, that common pleas ought not to be *begun* before the king himself; but that if common pleas, begun before any justices, on account of any difficulty or necessity, or by the precept of the king, be removed before our lord the king himself, either before judgment given, or afterwards, they ought of right to draw to themselves all things without which the said pleas could not be determined (*b*). Afterwards, before the said judgment was given, a discussion having arisen on the subject in the council of our lord the king, it is considered that this plea of warrantia would be more *safely* proceeded in banco, than before the king himself. And therefore it was said to the said Peter that he might sue (*quod sibi perquirat*) in banco, if such, he judged, would be expedient for him (*b*).

(*a*) And see *ante*, No. IX.

(*b*) "For lands in Beaumont." Rot. xli. T. 18 Edw. I. coram rege. Plac. in Dom. Cap. Westm. 282.

No. XXI.

Serjeant's Writ.

The form of the writ in the 16th century is as follows:—

“Edwardus &c. dilecto Sibi Jacobo Dyer, Armigero, salutem. Quia de advisamento concilii nostri, ordinavimus vos ad statum et gradum servientis ad legem, in *quindend Sancti Michaelis, Arch-angeli, proximâ futurâ* suscepturum, vobis mandamus, firmiter injungentes, quod vos ad statum et gradum prædictum *ad diem illum* in formâ prædictâ suscipiendum, ordinetis et præparetis; et hoc, sub poenâ mille librarum, nullatenus omittatis. Teste, Meipso,” &c. (a)

No return day is inserted in the modern form annexed to the Serjeants' case (b). At the return of the writ, the party summoned frequently excused himself or made default. Sometimes the writ abated by the demise of the crown before the return-day, and was not afterwards renewed, as was the case with Plowden in 1558. It must not therefore be assumed, as Dugdale (c) and others appear to do, that because a party is stated to have received his writ of summons, he has necessarily become a serjeant.

The following is a writ of the 15th century:—

Servientes ad le- } R. Johi de Preston et aliis (d). Quia de
gem constituti per } avisiamento Justiciariorum Nostrorum de
Regem. } utroque Banco te, unacum aliis personis *notabilibus*, ac in lege et consuetudinibus regni Nostri sufficienter instructis, ad statum et gradum servientis ad legem suscipiendum, nominavimus et constituimus &c., tibi precipimus, quod promptus sis et paratus statum et gradum, unacum aliis personis, susceptur. &c. (e)

The writs to John Martyn and others in the next reign, are “quia de avisiamento consilii Nostri” (f). So the writs to Ellecker and others (g), and to Ayshton and others, 21 Hen. VI. (h) The writs to Kyndeston and Nedeham (i) are entitled in the margin, “De statu et gradu servientis ad legem assumend.”

(a) Dyer, 72.

(d) i. e. in separate writs.

(f) Claus. 3 Hen. V.

(h) Claus. 21 Hen. VI.

(b) *Ante*, 13.

(e) Claus. 13 Hen. IV. Index, m. 29.

(g) Claus. 3 Hen. VI.

(i) Claus. 31 Hen. VI.

(c) *Ante*, 49.

*Discharge from a Distress levied for disobedience to such Writ.
Communia de Termino Sci. Hillarii anno 8 Regis Ricardi (a).*

Appendix.

Devon.
De Johe Cary ex-
onerando de £100
ab eo exactis eo
quod non suscepit
statum et gradum
unius servientium
legis (b), unacum
aliis qui ad hoc ad-
vocati extiterunt.

Compertum est in Orig. de anno 6^o Regis
nunc, ro. 45, quod idem Dominus Rex nunc,
per breve suum de magno sigillo suo, datum
26 die Nov. dicto anno 6^o, preciperit Johi
Cary, firmitèr injungens, quod statim, viso
brevis predicto, excusatione quâcunque ces-
sante, ad statum et gradum unius servien-
tium legis, unacum aliis qui ad hoc onerati
extiterunt, die Lune prox. ante festum Pu-
rificaconis beate Marie Virginis tunc prox.
futur., suscipiendum se pararet, et statum et gradum hujus ad
diem illum sine difficultate aliquâ susciperet, et hoc sub penâ C.
librarum, quas de terris, tenementis, bonis et catallis ipsius Johan-
nis, in casu quo statum et gradum illos ad diem predictum non
suscepit, idem Dominus Rex levare faceret, nullatenus omitteret;
per quod prefatus Johannes attachiatus fuit essendi hic ad plures
dies preteritis, et tandem in crastino Sancti Hillarii hoc termino,
ad respond' et satisfaciend' Regi de C. libris predictis.

Et ad predictum crastinum Sancti Hillarii predictus Johannes
Cary non venit; sed postmodum, viz. in 8 Purific' beate Marie
isto eodem termino, predictus Johannes Cary venit in propriâ
personâ suâ et dicit, quod ipse de predictis C. libris nec aliquâ
parte inde Regi respondere, neque satisfacere debet, quia dicit
quod Dominus Rex nunc de gratiâ suâ perdonavit prefato Jo-
hanni C. libras predictas et ipsum inde quietavit et exoneravit; et
unde idem Johannes Cary detulit hic breve Regis de magno
sigillo suo, Thesaurario et Baronibus hujus Scaccarii directum,
quod irrotulatur inter brevia directa Baronibus de hoc termino,
ro. 15, in hec verba: "R. Dei gra. &c. Et hoc sub penâ C. li-
brarum, quas de terris, tenementis, bonis et catallis suis, in casu
quo statum et gradum illos, ad diem predictum, non susciperet,
levare faciend' ad opus nostrum nullatenus omitteret; sicut per
inspectionem rotulorum Cancellarie Nostre Nobis constat: Jam-
que prefatus Johannes Nobis supplicavit, ut, cum vos (c) ipsum
ad respondendum et satisfaciendum Nobis de predictis C. libris,
eo quod statum et gradum predictos ad diem predictum non sus-
cepit, per breve Nostrum de Scaccario graviter distringi facitis, in
ipsius grave dampnum, ac status sui oppressionem manifestam,

(a) 8 February, 1384-5. *Ante*, 36.

(b) *Vide* Preface.

(c) Here the sheriff is addressed by "vos" and "vobis." *Ante*, 33, *Post*.

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velimus ei dictas C. libras perdonare, et ipsum inde exonerari jubere, Nos supplicaconi predictæ favorabiliter inclinati, ac cum prefato Johanne volentes agere gratiosè, perdonavimus eidem Johanni predictas C. libras, et ipsum inde quietamus et exoneramus: Et ideo vobis (a) mandamus, quod demande quam eidem Johanni ad respondend. sive ad satisfaciend. Nobis de predictis C. libris per summon. Scaccarii predicti facitis, supersederi, et ipsum inde, ad idem Scaccarium, exonerari et quietum esse, faciatis. Teste, Meipso apud Westm' 8 die Feb. anno regni Nostri 8. —Per Consilium." Et predictus Johannes petit, pretextu brevis predicti, de C. libris predictis exonerari et quietum fieri. Et visis premissis per Barones, dictum est prefato Johanni Cary quod quoad C. libras predictas eat ad presens sine die, pretextu brevis predicti et aliorum premissorum, salva actione Regis, si alias inde loqui voluerit.

No. XXII.

Pleading in the Common Pleas by Serjeants, 1477-8 (b).

Action on the statute of labourers, supposing that such a one was retained with him (the plaintiff) in London, yet the defendant has retained him out of his service within the term.

The defendant pleads in bar by Petit, serjeant (c).

"And now Genney comes to the bar, and was retained for the defendant, and pleads in abatement of the writ, inasmuch as the plaintiff does not shew in his count, in what place the defendant took his servant; and he was received to have the plea, notwithstanding the pleading in bar before, because it was matter apparent, and also the bar was not pleaded by a serjeant; and the writ was held abatable. The plea in bar was this; that the defendant found the said servant wandering in another county, out of any service, not being a merchant, and not having land; wherefore he retained him to serve him for a year; without this, that he retained him in London, as he has supposed; and this he is ready to verify.

(a) Here the sheriff is addressed by "vos" and "vobis." *Vide post*, 218.

(b) H. 17 Edw. IV. fo. 7, pl. 4.

(c) Afterwards said to be not pleaded by a serjeant. In the old edition of the Year Books, 1613, it is said, "par petit serjantie." There seems to be no ground for supposing that apprentices at law were called "petty serjeants," or that any persons were admitted to practice by that description.

"Littleton J.—This (a) is a good plea; for I conceive that in one county a man shall not take notice of a retainer in another county; but if all be in one county, I shall not be received to say that he was vagrant and out of service; because I ought not to be miscognizant of a thing within the same county; and there the defendant ought to traverse the first retainer; but since it is in another county, he has done well. And this was the opinion of all the court."

Appendix.

No. XXIII.

Writ of Right, and Wager of Battle for the Castle of Salisbury (b) terminated (1354-5) by a Writ from the King under the Privy Seal.

Writ of Right was brought by the Bishop of Salisbury against the Earl of Salisbury, by which the Bishop demanded the Castle of Salisbury with the appurtenances. And in last term they joined battle between the champions, of whom Robert S. (Shawel) was the champion of the Bishop, and Nicholas D. the champion of the Earl. And they had day until the morrow of the Purification. And that day was appointed by the Court that they should have their champions arrayed, ready to wage battle on that day. And now, on the very day of the morrow of the Purification, the Bishop came first; and his champion was placed at the bar, clad in white leather to the back of the neck, and above a coat of red taffeta (sandel), painted with the arms of the Bishop; and a knight to bear his coat painted, and a varlet his target, which was of a rose colour and painted, with images within and without. And the Bishop was at the bar, and his champion near him, the knight holding his baton. And Thorp, Serjt. caused the target to be lifted to the back of the champion, so that the top of the target reached the height of his head, and so it was held to the back of the champion, whilst he was at the bar. And after, on the other side, came the Earl; leading his champion by the hand, arrayed in leather; and above, a red taffeta (sendalle) coat, with escutcheon of the arms of the Earl. And two knights carried two white batons in their hands; and his target was held at the champion's back, as the target of the Bishop's champion.

(a) i. e. The plea, or rather demurrer, in abatement.

(b) Old Sarum. "Castr. Vet. Sar." Rot. Orig. in Cur. Scacc. 250 a.

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Knevit, Serjt. for the demandant. You have here Robert, Bishop of Salisbury, with his free man, Robert the son of John of S. (Shawel) arrayed in leather, ready to contest and to perform, with the grace of God, whatsoever the Court of our lord the king has awarded or shall award; who proffers this against William, Earl of Salisbury. And we pray that he be demanded.

Fiff. (qu. Fifehead) Serjt. You have here William, Earl of Salisbury, with his free man, Nicholas, the son of D., all arrayed in leather, ready to perform, with the grace of God, what the Court of our lord the king has awarded, or shall award.

GREEN, J.—Sir Bishop, go, and take a chamber in this palace (of Westminster) (a), and disarray your champion, and leave there all his harness under the guard of the warden (b) of the palace; and the Court here will see what ought to be done, so that there may be no fraud or deceit. And you, Sir Earl, in the same manner, in another room. And command was given to the warden of the palace to give chambers to them, “and do you keep your days Monday here.” And the Court said, “go, retire from the bar at the same time.” And because neither would retire before the other, they stood there till the justices rose, when they were made retire under a penalty.

Upon which day came the Bishop, and the Earl, with their champions, as before; but in the meantime the Justices had seen all the array, so that the batons were of one length and thickness, and the targets of one length, and breadth, and the images. And two took off the harness of the champions. And Thomas, my Lord Beauchamp, came into the Place (c), and put before the justices a letter sealed with the privy seal (d), rehearsing the matter of the plaint between the parties; and inasmuch as it touched the right of the king, he asked of the justices “quod continuarent placitum illud, in eodem statu quo nunc est, usque ad diem Jovis proximum sequentem.”

GREEN, J.—Inasmuch as the king had demanded of us to continue the plea, and we having examined the array of the champions, and finding no default, and not knowing whether there should be amendment or not, keep your days here in the same condition as now, on Thursday next. (Et dicebatur, that the justices

(a) As to which, see Rot. Parl. Index—“Westminster, Palace of.”

(b) As to the wardenship of the king's palace at Westminster, with the wardenship of the Fleet prison annexed, see Rot. Orig. in Cur. Scacc. i. 29 b.

(c) The Court of Common Pleas.

(d) Vide ante, 90, post, 212.

had found in the coat of Shawel, who was the champion of the Bishop, many rolls of charms and sorceries; et ideo GREEN, J. dixit præmissa.) And remove you from the bar. And for that neither would go before the other, they remained till the justices rose, as before. And GREEN, J. said to the demandant, Sir Bishop depart from the bar upon pain of losing your action. Whereupon he departed. And before this day they accorded, so that the Bishop should give to the Earl 2500 marks. And on the Thursday, the Bishop came with his champion arrayed in leather, as before. And the Earl was demanded, and he did not come, and the default was recorded. Thorp then presented a writ for the Bishop, rehearsing the matter, and how the Earl had prayed aid of the king, and how afterwards the king had commanded the justices that they should proceed in the plea : Ita quod non procederent ad iudicium reddendum, ipso non consulto ; et nunc mandavit, quod si taliter in negotio prædicto processum sit, ulterius ad finalem discussionem procedant nunc, non inquirentes de collusione (a) secundum formam statuti de religiosis. Wherefore GREEN related all, how the battle was waged ; and then the default of the Earl was recorded. Whereupon it was awarded against the Earl, that the Bishop should recover the castle of S. as in right of his church of our Lady of Salisbury, to him and his successors, quit of the Earl and his heirs, for ever. And, Sir Bishop, sue execution on that, virtute brevis prædicti, &c., absque inquisitione aliqua de collusione (b).

No. XXIV (c).

Tenure of Office, by Corporation Justices.

As a matter of practice, corporation justices under royal charters are not removable ; because those charters almost inva-

(a) And see P. 2 Edw. III. fo. 10, pl. 11.

(b) H. 29 Edw. III. fo. 12. And see a full description of wager of battle in a writ of right of advowson between Staunton and the Prior of Lentone, (Plac. coram Just. Itiner. apud Northampton. 3 Edw. III. Dugd. Orig. Jurid.) in which case the fraunk home and champion of each party is called "son ser-jant" (*ante*, 193, n.), and the pleader is called "le serjant que dit les parols."

In the Knight's Tale (Chaucer, l. 1712) the duke exclaims :

"But telleth me what mistere men ye ben,
That ben so hardy for to fighten, here,
Withouten juge or other officere."

(c) *Ante*, 65.

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riably direct, that offices shall be held either for a certain fixed period, or during good behaviour (i. e. for life, unless the party forfeit the office by misconduct.) There would have been no objection, however, *in point of law*, to a charter directing that the offices should be held during the pleasure of the crown. With respect to the 140 boroughs mentioned in the four schedules to the Municipal Corporation Act, 5 & 6 W. IV. c. 76, it is enacted (section 98), "That it shall be lawful for His Majesty, *from time to time*, to assign to so many persons as He shall think proper, His Majesty's commission to act as justices of the peace in and for each borough, and in and for each of the counties of cities and towns respectively named in the schedule A., and in and for such of the boroughs in the schedule B., to which His Majesty may be pleased, upon the petition of the council thereof, to grant a commission of the peace." Under this provision a borough justice, who has rendered himself obnoxious, may be removed by the issuing of a new commission, in which his name is omitted; as was done in the case of Mr. Frost, one of the justices for the borough of Monmouth. The mayor, the last ex-mayor, and the recorder, are justices by virtue of their offices, and cannot be removed except for misconduct.

No. XXV.

Parliamentary Attendance of the Serjeants at Law, as well King's Serjeants as others (a).

The writs of summons to Parliament from the time of Henry the Third, to that of Richard the Third, printed in the Appendix to the Report (b) on the Dignity of a Peer, afford the following evidence and information on this subject.

Appendix, I.
p. 463.

In the 10th Edw. 3, writs were directed to three King's Serjeants.

466	10 Edw. 3.	To the same, described <i>Servientibus Regis</i> .
477	10 Edw. 3.	To the same, by the same description.
560	20 Edw. 3.	To two King's Serjeants.
574	21 Edw. 3.	To the same two, and two others.
576	22 Edw. 3.	To the same four.

(a) Extracted by Edward Griffiths, Esq., one of the Masters of the Court of Common Pleas.

(b) Drawn up by the late Lord Redesdale.

22 Edw. 3. To the same four.	580
22 Edw. 3. To the same four.	583
24 Edw. 3. To the same four.	589
25 Edw. 3. To the same four.	592
28 Edw. 3. To two of the above, and two others.	603
29 Edw. 3. To the same four.	605
2 Ric. 2. To two King's Serjeants.	679
9 Hen. 5. To two, called severally, one of the King's Serjeants at Law.	853
3 Hen. 6. To one of the above, and one other by the same description.	862

These appear to be all the cases in which the parties summoned are *described* as serjeants.

That they were not all the instances of serjeants summoned which have occurred, appears, *inter alia*, from this, that the same individuals are summoned by intermediate writs, though in such writs they are not described as serjeants.

That they were *selected* by the crown, and did not include all the existing serjeants at the different periods, is to be inferred, not only from the smallness of their number in each case, but from analogy with the judges, who it is evident were never all summoned.

That the serjeants, however, were summoned, though not described as such in the writ, during all this period, will appear upon collating the writs with other documents. A few instances are subjoined.

In 12 Edw. 2, Will Herle, Gilbert Toutheby, Geoffry Le Scrop and John Sturde, were summoned. Rep. 289.

It appears three years before (9 Edw. 2), by the Liberate Rolls, that the same four were serjeants ; when they were made, is not stated in Dugdale. Dugd. Orig. 37.

In 14 Edw. 2, Herle and Sturde were judges, and in 17 Edw. 2, Le Scrop was made chief justice. Hence, it seems, they must have been serjeants at the time of this writ.

The same are summoned again in 12 & 13 Edw. 2. Rep. 293, 299.

Le Scrop was attorney-general in 14 Edw. 2. Dugd. Orig. 39.

In 14 Edw. 2, John de Denum was summoned. He was paid as a serjeant in the same year, and was made king's serjeant to Edw. 3, in the fifth year of his reign. Rep. 309. Dugd. Orig. 39, 41.

He was summoned again in 16 & 17 Edw. 2, and in 3 Edw. 3. Rep. 329, 345, 391.

In 3 Edw. 3, Cantebrigg and Aldeburgh were summoned, and were paid, as king's serjeants, in the same year. Dugd. Orig. 41.

Parnyng, Scott, and Trewasa, (the first who are called ser- Rep. 463, 446, 480.

- Appendix.* jeants in their summonses in 10 Edw. 3, as before stated,) were summoned in 9 Edw. 3, and in 8 Edw. 3, and Parnyng also in previous year, though not described as serjeants.
- Rep. 986. In the last printed summonses, 22 Edw. 4, the name of Tremayle, who was made a serjeant in that year, and a judge in 3 Henry 7, appears. It is observable also, that he was not a king's serjeant till 1 Ric. 3.
- 2 Rot. Parl. 164. One important duty the serjeants had in parliament, was to assist the lords and the judges in the trial of petitions. This appears by the parliament rolls from the 21st of Edw. 3. In that year, triers of the petitions seem to have been, as usual, appointed, and they were to call to their assistance the king's serjeants, if necessary.
- 2 Rot. Parl. 254. In the 28th of Edw. 3, 14 triers are appointed to try petitions, "assisted by the chancellor, the treasurer, the steward, the chamberlain, and the king's serjeants, when it may be necessary."
- 1 Rot. Parl. 275, 289, 294, 303, 317, 321, 363; 6 Rot. Parl. 441, 458, 509, 520. This seems to occur again at the beginning of every subsequent parliament throughout these rolls. In the margin are inserted a few references to the 1st vol. of these rolls, and in the 6th vol. to shew the continuance of the practice.
- 5 Rot. Parl. 42. In the 11th of Hen. 7, (1495,) the triers are to call the serjeants at law. They are not called king's serjeants (a).
- It is declared (20 Hen. 6), that a clause added to an act of parliament, by the advice of the lords spiritual and temporal, and of the king's serjeants at law, without the commons, is bad (b).

(a) Seventeen prelates and peers were appointed triers of petitions from England, Ireland, Wales, and Scotland, "Omnes insimul, aut sex prelatorum et dominorum antedictorum, advocatis sibi Cancellario, Thesaurario, et *Servientibus ad legem*, quociens opus fuerit." Sixteen prelates and peers were appointed triers of petitions from Gascony and other foreign, or rather, transmarine, (exter.) lands and countries, and also the Islands, "Omnes integraliter vel quatuor ex prelati et dominis supradictis, accersitis sibi Cancellario, et Thesaurario, ac *Servientibus ad legem*, cum opportunum fuerit." 6 Rot. Parl. 458.

(b) And see *ante*, 192. This declaration will appear less extraordinary upon referring to the Parliament Roll. of 21 Richard II. (1397), 3 Rot. Parl. 358 b. "Whereupon by the king, with the assent of the lords spiritual and temporal and the procurators of the clergy, (as to whose concurrence, see 4 Inst. 5, 12; 2 Rot. Parl. fo. 99; 11 Rich. II. c. 3; 21 Rich. II. cc. 2, 12; 1 Gibs. Cod. 146, 147,) and of the said commons, and by the advice of the justices and serjeants aforesaid there being, it was awarded and adjudged, ordained and established, that the said Parliament, held in the said eleventh year, be utterly annulled and held for none, as a thing done without authority, and against the will and liberty of the king (*vide stat.* 15 Edw. III.) and the right of his crown."

No. XXVI. (a)

Appendix.*Mr. Burke on prescriptive Rights.*

"What have you to answer in favour of the prior rights of the crown and peers but this,—our constitution is a *prescriptive* constitution; it is a constitution, whose sole authority is, that it has existed time out of mind. It is settled in these two portions against one, legislatively; and, in the whole of the judicature, the whole of the federal capacity, of the executive, the prudential and the financial administration, in one alone. Nor was your House of Lords (b), and the prerogatives of the crown, settled on any adjudication in favour of natural rights; for they could never be so partitioned. Your king, your lords, your judges, your juries, grand and little,—all are prescriptive; and what proves it, is, the disputes,—not yet concluded, and never near becoming so,—when any of them first originated (c). Prescription is the most solid of all titles, not only to property, but, which is to secure that property, to government. They harmonize with each other, and give mutual aid to one another (d)."

No. XXVII. (e)

Origin of the rank of King's Counsel.

"23 Car. II. Edward Turner, Esq. Aurat., Speaker and Solicitor-General, ad statum et gradum, &c., 19 Maii, seems to have been the first king's council (a consiliis in lege peritus domino regi constitutus,—solicitor regis generalis 11 Maii), succeeded by Francis North, 20 May, in his office of solicitor-general, and made chief baron the same term."—Dugd. Chronica Series, 117.

Mr. Wynne (Tracts, 298) subjoins the following note:

"That point to me, I own, but with great submission, seems rather doubtful. Sir Edward Turner stands undoubtedly first in Dugdale's list, and it seems to be the first entry of the kind that occurs; but this entry cannot possibly decide the priority,

(a) *Ante*, 75.

(b) *Ante*, Appendix No. VIII.

(c) *Ante*, 69 (b).

(d) This extract, which is rather obscurely worded, is taken from the "Speech on Parliamentary Reform," Burke's Works, vol. x. p. 96, and seems to be the passage alluded to in the argument, *ante*, 75. See also Burke's "Letter to a Noble Lord."

(e) *Ante*, 25. And see *post*, 246.

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as to this species of preferment, between Sir Edward Turner and Sir Francis North; because it only shews when they were made serjeants, not when either of them was made king's counsel. On the other hand, my reasons for thinking Mr. North was the first of this order (which, as a regular order, began about this time) are these: The particular description of his brother (a), who wrote his life, the manner in which this preference was received by the Benchers of the Middle Temple, and the resentment the Court of King's Bench expressed at the Benchers' refusal to acknowledge his precedence, by making it a kind of 'dumb day' with them (as his lordship afterwards made in his own court (b) on another occasion); all plainly prove, with the silence of the books before this time, that this was the time that gave birth to the order, and that he was the first of that order. The occasion of this preferment (from the writer of his Life, p. 39 (c)), was 'Mr. North's arguing at the Lords' bar the cause of Mr. Hollis, on a writ of error, at the intercession of the attorney-general, who at that time of day, being an assistant of the House of Lords, could not argue there.' (See Lord Clarendon's History, b. 3, 1 vol. 166.) Mr. North argued on behalf of the crown; and although, says the writer, 'the Commons carried the cause, he was thereupon made of the King's council, which gave him the privilege of pre-audience, and coming within the bar. This action, and its consequence, had the effect of a trumpet to his fame; for the King had no council then, except Serjeants, *ibid.* 37' (d). So far the writer; and it seems, wherever in old law books we meet with King's council, by that name are to be understood, either the Privy Council, the judges, or his serjeants; sometimes the parliament itself (e). 3 Inst. 125, and 1 Inst. 164. And so the stat. of Hen. VIII. (f), of residence. But scarcely any council in law, of the kind now particularly distinguished by that name. Lord Bacon indeed (as we find from those valuable letters lately published by Dr. Birch (g)) informs us, as the first step of his preferment, 'he was made the king's council extraordinary;' but then he adds, 'it was without patent or fee, a kind of individuum vagum.' Letters, p. 256; so that Sir Francis North's was probably the first regular appointment" (h).

(a) The Honourable Roger North.

(b) *Ante*, 141.

(c) Roscoe's edition, i.

(d) *Ibid.*; *post*, 217.(e) *Commune concilium regni.*

(f) 21 H. 8, cap. 13, s. 28.

(g) "Letters, Speeches, Charges, and Advices of Lord Bacon," by Thomas Birch, D. D.

(h) Wynne's Tracts, 298.

No. XXVIII. (a)

Appendix.*Serjeant Bendloes.*

In the south window of the chapel of Serjeants' Inn, Fleet Street (b), there was the following inscription under the arms :—

" Gulielmus Bendlowes, serviens ad legem (quamplures annos inter alios) eximius, annis reginarum Mariæ ultimo et Elizabethæ primo, superfuit et claruit solus : conscripsit casuum in jure sui temporis relationes, quibus hodie apud jurisconsultos fides et usus est non vulgaris ; vir doctus, probus, pius. Legavit huic Hospicio quinquaginta libras, quas Willielmus, ejus filius, præstitit, vicesimo die Maii, anno 1596 (c)." Rowe says, in his preface to Bendloes' Reports, that William Bendloes was the only serjeant at law for part of the time of Philip and Mary, and part of Elizabeth's reign. This may be verbally true, because by the death of Mary ten serjeants' writs abated (d). But in M. 1 Elizabeth we find four serjeants arguing in the Common Pleas (e). This statement by Rowe seems to be the foundation of the story in the Preface to the 3 Modern, in which the 1st Eliz. is substituted for the 10th.

No. XXIX. (f)

Oath of Justices of C. P. as required by 18 Edw. III. stat. 4.

You shall swear, that well and lawfully ye shall serve our soveraigne lord the king, and his people, in the office of Justice,—and that lawfully (g) ye shall counsaile the king in his businesses,—and that you shall not counsaile, nor assent to, any thing, which may turn him to damage or disherisō, by any maner, way, or colour;—and that ye shall not know the damage or disherison of him, whereof ye shall not do him to be warned by yourself or by other,—and that ye shall do even law and execution of right to all his subjects, rich and poore, without having regard to any person,—and that ye take not by yourself, or by other, privily nor apierly, gift nor reward of gold nor silver, nor of any other thing which may turne to your profit, unlesse it be meat or drinke, and that of small value, of any man that shall have any plea or process hanging before you, as long as the same process shall so be hanging, nor after the same cause;

(a) *Ante*, 138, 167.

(b) Burnt down in the great fire of London, and rebuilt in 1670.—Herbert's *Antiq. Inns of Court*.

(c) *Dugd. Orig. Jurid.* 331.

(d) *Dugd. Chron. Ser.* 165. And see *Cro. Jac. I.*

(e) *Plowd.* 190.

(f) *Ante*, 91.

(g) *Loyalment*, honestly.

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and that ye take no fee, as long as ye shall be Justice, nor robes of any man great or small, but of the king himselfe. And that ye give none advice nor counsaile, to no man, great nor small, in no case where the king is party,—and in case that any, of what estate or conditiō they be, come before you in your sessions, with force and armes, or otherwise against the peace, or against the forme of the statute thereof made, to disturbe execution of the common law, or to menace the people, that they may not pursue the law, that you shal do their bodies to be arrested and put in prison, and in case they be such that ye may not arrest them, that ye certifie the king of their names, and of their misprison hastily, so that he may thereof ordaine a covenable remedy,—and that ye, by your selfe nor by other, privily nor apertly, maintaine any plea or quarrell hanging in the king's court or elsewhere in the country,—and that you deny to no man common right, by the king's letters, nor none other man's, nor for none other cause, *and in case any letters come to you contrary to the law, that ye do nothing by such letters, but certifie the king thereof (a), and go forth to do the law, notwithstanding the same letters (b).* And that ye shall doe and procure the profit of the king, and of his crowne, with all things where ye may reasonably do the same. And in case ye be from henceforth found in default in any of the points aforesaid, ye shall be at the king's will of body, lands and goods, thereof to bee done as shall please him ; as God you helpe.

No. XXX. (c)

Independence of the Judges, as said to be secured by 13 (12 & 13) Will. III. c. 2, and 1 Geo. III. c. 23.

Blackstone says (1 Comm. 267), "In order to maintain both the dignity and independence of the judges in the superior courts, it is enacted by the statute 13 Will. III. c. 2 (d), that their

(a) Quære, whether, under this branch of the oath, the judges might not have certified that the warrant of 1834 was illegal.

(b) On Monday, the Eve of St. Nicholas, 11 Edw. II. the king sent to Henry le Scrop and his companions, his justices assigned to hold pleas before himself, a writ under the great seal, tested 22 November in the same year, directed to them, whereby he commanded them that they should not omit to do justice for the king and others suing before them, by reason of any writ, under the great or privy seal, to them theretofore directed, or thenceforward to be directed. Abb. Plac. 329; 3 Abb. Rot. in Sccio, 446 b. And see *ante*, 90, 204; *post*, No. LVIII.

(c) *Ante*, 82, 165.

(d) 12 & 13 Will. III. c. 2, s. 3.

commissions shall be made not, as formerly (a), *durante bene placito*, but *quamdiu bene se gesserint*, and their salaries ascertained and established; but that it may be lawful to remove them on the address of both houses of parliament. And now, by the noble improvements of that law, in the statute of 1 Geo. III. c. 23, enacted at the earnest recommendation of the king himself from the throne, the judges are continued in their offices during their good behaviour, notwithstanding any demise of the crown, (which was formerly held immediately to vacate their seats,) and their full salaries are absolutely secured to them during the continuance of their commissions; His Majesty having been pleased to declare, that 'he looked upon the independence and uprightness of the judges, as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the crown (b).'

Blackstone here appears to treat the latter alteration as if it had been a *sacrifice* on the part of George III. of some portion of his prerogative in favour of the independence of the judges; but it is evident that the whole concession was made by the statute of Will. III., and that the provisions of 1 Geo. III. c. 23, in no way interfered with any power of appointment to be exercised by that prince, but that on the contrary the latter statute gave him the power of making judges for his successors (c).

No. XXXI.

Lord Keeper Coventry's Speech, on the Creation of Serjeants, in
12 Car. I. 1636.

Extracts from this speech will be found in Waterhous's "*Fortescutus illustratus*, or Comments upon Fortescue."

"A very antient state and degree, so antient that books are silent on it, as on the commencement of the common law." Waterhous, 547. "For serjeants of old were men of learning

(a) See Whitelock, 16, May, 17; Hutt. i. 132.

(b) And see Notes of Lord Hardwicke, prepared on moving an address upon His Majesty's Speech, in the 15th vol. of Parl. Hist.

(c) It should not be forgotten that the learned writer of the Commentaries on the Laws of England, who takes so courtly a view of this act of royalty, was solicitor general to the queen, and that he afterwards, from his Commentaries rather than from his conduct on the bench, acquired (Gibbon's Decl. and Fall, chap. 44, vol. viii. 145 n.) the name of "the orthodox judge."

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and great cunning, who did love the law for the law's sake, and intended their clients' cases for God and a good conscience sake; in order to which heretofore counts and pleadings were received at the bar, and every little doubt was prepared and cleared by a debate there openly, before either demurrer or issue were joined; such was the care of the serjeants not to disadvantage their client's cause by any sudden or indigested conceptions, or by omissions or neglect; and then the prothonotary entered it upon record." Ibid. 548. And for further extracts, see *ibid.* 550, 558.

No. XXXII. (a)

Address of Lord Commissioner Whitelock to the new Serjeants,
18 Nov. 1648.

The new serjeants appeared at the Chancery bar, and I made the speech to them to this effect:

Mr. Serjeant St. John (b), and the rest of you, gentlemen, who have received writs to be Serjeants at Law.

It hath pleased the parliament, in commanding these writs to issue forth, to manifest their constant resolutions to continue and maintain the old settled form of government and laws of the kingdom, and to provide for the supply of the high courts of justice, with the usual number of judges, and to manifest their respects to our profession; and likewise to bestow a particular mark of favour upon you, as eminent members of it. The good affections to the public, and the abilities of most of you, they know by experience among themselves, and of the rest, by good information.

I acknowledge that the burthen of this business lies heavy upon me, in regard of my own weakness, and the worthiness of the persons to whom my words are directed; but as I am of the least ability to give, so you have the least need to receive, instructions.

I should be unwilling to see the solemnity of this general call diminished, and am the rather persuaded to supply my present duty for several respects.

1. For the honour of that authority (c), which commands your attendance and my service, upon this occasion.

(a) *Ants.* 71.

(b) On the following 21st of November St. John was appointed chief justice of the Common Pleas—*Whitelock Memor.* 356.

(c) That of the Long Parliament.

2. For the honour of this Court (a), which challengeth a great share in this work, your writs issuing from hence, your appearance here recorded, and your oath is here to be taken.

3. The honour and particular respects which I have of you that are called to this degree.

4. And lastly, out of my own affections to the degree, being myself the son of a serjeant (b), and having the honour to be one of your number in this call; and I do acknowledge that both in my descent and fortune, I am a great debtor to the law.

For these reasons, I presume, (especially being with those from whom I have by long acquaintance found much friendship,) that I shall now receive a fair construction of what I speak upon this very great subject.

My observations shall be upon your call by writ, and upon the writ itself.

Your being called *by writ* is a great argument of the antiquity of serjeants (c). The Register hath many writs (as my Lord Coke holds in his preface to the 10 Rep.) that were in use before the Conquest (d), and in the most antient manuscript registers is your writ, of the same form with those by which you are called; and if there had been any alteration within time of memory, it would probably have been extant.

We find serjeants at law often mentioned in our Year Books, and in the records in the Tower, as high as the beginning of Edw. I., and by Bracton (e), who wrote in Henry the Third's time. And it may probably be conjectured, that William de Bussey was a serjeant, by his habit of the coif, and his office; of whom Matthew Paris relates, 42 Hen. III., that he was *seneschallus, et principalis consiliarius, Gulielmi de Valentia (f)*;

(a) The Court of Chancery, Bulstrode Whitelock being then first commissioner of the great seal.

(b) Sir James Whitelock, made Serjeant 1622, Justice of K. B. 1624.

(c) The king has an interest in his subjects, and may command their services in any public capacity for which they are fit. *Rex et Regina v. Larwood*, 1 Salk. 168. "A serjeant at law" (or rather a serjeant *elect*) "is liable to punishment for not taking upon himself that degree after being called thereto by the king's writ," per Lord Ellenborough in *Morris v. Burdett*, 2 Maule & Selw. 218. But a writ does not lie to require a person to take upon himself the degree of an apprentice at law or that of barrister at law; nor will a writ of mandamus lie to call a person to the bar. *Townsend's case*, Sir T. Raym. 69.

(d) As to this fancied antiquity of writs in England, see Appendix, No. 2, to Stephen on Pleading, 4th edition.

(e) See Bracton, 372 b, 412, a.

(f) Brother-in-law of Henry III., and uncle of Edward I. See 1 Rot. Parl. 16 a, 17 a, 30 a, 33 b, 35 a b, 37 b, 38 b, 39 b, 52 b, 66 a, 70 a, 75 b, 76 a, 77 a, 80 b, 84 a, 115 b, 131 a, 138 b, 224 a, 311 a, 391 a.

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and being accused for great crimes, upon his trial, when he could not acquit himself—"Voluit ligamenta sue coiffe solvere, et palam monstraret tonsuram se habere clericalem," and so to have avoided judgment; but it would not serve his turn (a).

Thus far it is granted by a little manuscript treatise (b), which endeavours to detract from the honour of this degree, and therefore requires an answer.

It asserts, that by Magna Charta (*Communia Placita non sequantur curiam nostram*) the Court of Common Pleas was erected; and that some of our profession, by writ *then* framed, were commanded to attend that lower court, the lawyers being generally willing to leave the king's house, where the other courts of justice then sat, and to attend this new court elsewhere. It is reasonable well that they are allowed the antiquity of 9 Hen. III. (c), and, by this, as antient as the Common Pleas Court; but the error, that this court was erected 9 Hen. III., is sufficiently refuted.

The same great charter is in Matthew Paris, in King John's time, with the words of *Communia Placita &c.* in it, but I presume his meaning is, that before the statute of Magna Charta, there was no Court of Common Pleas; though his words be before 9 Hen. III.

It is manifest, by undeniable authorities, out of antient manuscripts and rolls, and the Black Book of Peterborough, that cases were adjudged in Rich. I. and Hen. II.'s time, *coram justitiariis in Banco residentibus* (d); and the names of those that were then judges of this court are set down many years before Magna Charta was granted; which by Hovenden, Paris, and others, are said to be the laws of Edward the Confessor (e). And if it be admitted, that serjeants are as antient as these laws, they allow them the antiquity of the Confessor; and if as antient

(a) M. Paris, speaking of the same reign, also says, "*Metus et persuasio ipsius Johannis (Mansel) omnium justiciariorum, et placitantium advocatorum, quos banci narratores vulgariter appellamus, ora penitus obturavit. Ita ut multo totiens oportuit Dominum Willielmum, tunc cellarium, (virum scilicet circumspectum et facundum,) suum sermonem et querelam in personâ propriâ, coram justiciariis, imo etiam coram Rege et Bar'nagio, proponere: Et protestati sunt justiciarii, secretius in aure dicti Domini Willielmi instillantes, quod duo, tunc temporis, in regno dominabantur, scilicet, comes Richardus, (Richard, King of the Romans, and Earl of Cornwall,) et Johannes Mansel—contra quos non audebant sententiaré.*" Matth. Paris, 1077.

(b) *Ante*, Appendix, No. IV.

(c) The date of the Magna Charta of the statute-book.

(d) And see Bract. 105 b.

(e) *Sed vide supra*, 68, n.

as this Court; they are certainly as antient as any thing in our law. But the author of this treatise affirmeth, that before the erection of the Court of Common Pleas, it cannot be shewed that there were any special serjeant pleaders. I am of this opinion, and likewise that no man can shew when that Court was first erected (a); which is also the opinion of my Lord Coke, 5 Rep., 9 Edw. IV., Sir Roger Owen (b), Lambert, and others. Yet if the author mean, that before Magna Charta, 9 Hen. III., there were no such serjeants, he may be satisfied of the contrary out of Hovenden, and Paris (c), who lived in Ric. I. and Hen. III.'s time, and are authors of good credit. They recite the charge of the justices in eyre, given in Ric. I. and king John's time (d). One of their articles is, to inquire of the serjeants' at law and attorneys' fees.

In the Book of Entries (e), in a bill of debt against a serjeant at law, in the Common Pleas; he shews and prescribes, that serjeants could not be sued there by bill, but by writ out of the chancery; and this, being by prescription, shews that serjeants were before the time of Rich. I. (f).

And the Mirror of Justices (which I presume they will not deny to be yet more antient (g), and which my Lord Coke holds to be written before the Conquest), saith, a countor est un sergeant sachant la ley de realm, to pronounce and defend actions in judgment (h).

From the antiquity of the degree, I come to my observations upon the words of your writ, which I shall take in order as they are.

1. Quia, de advisamento concilii nostri, &c.

These words are in the writs of creation of peers (i), and in the summons of them, both spiritual and temporal, and of the judges and king's counsel (k), to the parliament, and in your writs, but in no other, except upon some high and weighty occasions touching the public safety and the like.

And, for your greater honour, this council, by advice of which you are called to this degree, is the great council of the kingdom.

2. The next words in your writ are, Ordinavimus Vos (l) &c. in the plural number, in the second person, which is an enallage

(a) *Ante*, 68, 122.

(c) And see *ante*, 216 (a).

(e) *Post*, 234.

(g) *Ante*, 30, 32, 181.

(k) i. e. serjeants, *vide ante*, 210.

(b) *Vide* Reeves, Hist. Engl. Law.

(d) *Quere*, as to this charge.

(f) *Ante*, 73.

(h) *Ante*, 32.

(i) *Ante*, 176.

(l) *Ante*, 33.

Appendix. of numbers, chiefly to express excellency in the person to whom it is referred.

Selden, in his Titles of Honour, fo. 121, sheweth the use of it in the Jewish nation, and in France, Spain, Germany, and other countries (b); and always is in dignity of the party to whom applied; and the style of the chancery is so only to the peers, the judges, the king's counsel, and to the serjeants.

Therefore, 29 Edw. III. fo. 44, in a quare impedit, the writ was "precipite," and excepted against, as false Latin; but Thorp said it was not false Latin, but the plural number only to express reverence to the person; the other answered, that no such reverence is done to a *sheriff* (b); and for this the writ was abated.

3. The next words in your writ are, *ad statum* (c), &c., which sheweth dignity and honour given to them.

The author of the manuscript, formerly cited by me, allows the serjeants but little state, where he saith, they kept their *pillars* at Paul's, where their clients might find them, as if they did little better than—*emendicare panem*.

This was somewhat far from Westminster Hall, and as far from truth, being grounded upon mistake of one of their ceremonies of state, where they went to Paul's to *offer*.

A manuscript (d) of the call of Fitzjames, and other serjeants, 11 Hen. VIII. saith, that their steward brought every one of them to a several *pillar* in Paul's, and there left them a time for their private devotions; no convenient time for clients (e).

(a) In Roman Catholic countries, addresses to the Deity as well as those made to saints and angels, are in the second person plural; by Protestants, the Deity is usually addressed in the singular number.

(b) *Sed vide ante*, 202 (a).

(c) *Ante*, 33.

(d) Since printed in Herbert's Antiquities of the Inns of Court and Chancery, 361.

(e) Littleton (s. 342) speaks of payments appointed to be made in St. Paul's, "at the tomb of St. Erkenwald (*vide* Co. Litt. 312 a), or at such a *pillar*."

"And when the newe serjaunts have dyed, then they goo in a sober manner with their seid officers and servants into London, oone the est side of Chepe Syde, oneto Seynt Thomas of Acres, and ther they offer, and then come down on the west syde of Chepe Syde to Powles, and ther offer at the rode of north dore, and at Seynt Erkenwald's shrine, and then goo downe into the body of the church, and ther they be appointed to their *pyllys*, by the styward and countroller of the feste, which broght them thidder with the other officers." T. 13 Henry VIII. (1521).—Herbert's Antiquities of the Inns of Court, 361.

"There is a tradition that, in times past, there was one Inne of Court at Dowgate, called Johnson's Inne; another in Fewter (Fetter) Lane, and another in Paternoster Row; which last they would prove, because it was next to St. Paul's Church, where each lawyer and serjeant, at his *pillar*, heard his client's

In the Register (a), a writ of *Ex gravi Querela* mentions a devise to a priest, to say mass at a pillar in Paul's; and I believe most of us, both in this, and other great churches, have seen old people kneeling at the pillars, in their private prayers.

Our old English poet, Chaucer, (whom I think not improper to cite, being one of the greatest clerks and wits of his time,) had a better opinion of the state of a serjeant, as he expresseth in his Prologue of the Serjeant.

' A serjeant at law, wary and wise,
That oft had been at the pervice,
There was also, full of excellence,
Discreet he was, and of great reverence.' (b)

And in his description of the Franklyn (c), he saith of him,

' At sessions there was he lord and sire;
Full oft had he bin knight of the shire,
A sheriff had he bin, and a countor; (d)
Was no where such a worthy vavasor. (c)'

A countor was a serjeant, and a vavasour was the next in degree to a baron.

We find in many of our Year Books, especially in Edward *cause*, and took notes thereof upon his knee, as they do in *Guildhall at this day*."—Dugd. Origin. Jurid. 142.

"And withyn one howre after (i.e. after two o'clock when the Lord Chancellor and other lords who had partaken of the feast given on the call of Whiddon, Coke, Pollard, and others, in 1547, at Lincoln's Inn, departed) the seid newe sergeaunts went to Paule's, and there eche of theme stode at their severall pillars in the body of the church, accordyng to the auneynt custome ine that case used, and from thens they camm to Sergeaunts' Inne, every of theme to their severall chambers, and there remayned."—Ibid. 370. In the old Cathedral, burnt down in the great fire of London, the centre aisle, called Paul's Walk, of which an engraving is given in the Pictorial History of England, seems to have been a place of public resort for all classes, at stated hours in the morning and in the afternoon. And see 2 Reeves' Hist. Engl. Law, 360.

(a) *Quere*. Whitelock appears to have made this reference from memory, without verifying it. There is a devise to say mass, *ad altare Sci Johannis*, in *novo opere ecclesie Sci Pauli*, Reg. Brev. 245 a, F. N. B. 149 b.

(b) Chaucer is cited more fully and more correctly, *ante*, No. XII.

(c) *Vide* Shakspeare, Cymbeline, act iii. scene 2; Henry IV., second part, act ii. scene i.; *ante*.

(d) In the subsidy granted in 1378 (the levying of which was attended with such disastrous consequences), serjeants at law are assessed at 40s., whilst serjeants and franklins in the country are assessed at 6s. 8d. or 3s. 4d. according to their estates. In calling the franklin a countor, a designation belonging to the serjeant at law, Chaucer would appear to have confounded the two species of serjeants.

(e) See Appendix, No. XII.

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the Third's time, that they were joined with knights, in assises, trials of challenges, &c. (a) 38 Hen. VI. fo. 31, Prisot saith to the serjeants, they would have no *worship* by such an act &c. and that word was given to the lords (b) in those days (c).

By the statute 12 Rich. II. c. 10, the same privilege, which is given to the judges for absence from the sessions (d), is given also to the serjeants.

34 Hen. VI. Brooke's Abridg. *title* Nosme 5 (e) saith, that *serviens ad legem est nosme de dignity, comme chivalier*, and it is character indelebilis; no accession of honour, or office, or remotion from them, takes away this dignity, but he remains a serjeant still (f).

Their robes and officers, their bounty in giving rings, their feasts, (which, Fortescue saith (g), were coronationis instar, and continued antiently seven days, and, as Holingshed notes, kings and queens were often present at them,) and all their ceremonies and solemnities in their creation, do sufficiently express the state due unto them (h).

The next words in your writ are, *et Gradum &c.* This is a degree of such eminency, that the professors of law in no other nation are honoured with the like, with such solemnities and state as I have before mentioned, and, by mandate, under the public seal of the commonwealth (i).

I find, indeed, in the preface to the Digest, several appellations given to the students of that law; that they called them *Dupondios* (k), or *Justinianeos* (l), and (when of farther standing)

(a) But the serjeants so joined were not serjeants at law. *Vide ante*, 192.

(b) It is so applied 3 Rot. Parl. 452.

(c) Richard II. was told by Thirnyng, that he had "renounced and cessed of the state of kyng and of lordeshippe, and of all the dignitee and *wirsshipe* that longed thereto;" 3 Rot. Parl. 424; and see 5 Rot. Parl. 409 b.

(d) And see 14 Edw. III. fo. 16; 11 Richard II. c. 10.

(e) The case of *Noreis v. Somerset*, H. 35 Hen. VI. fo. 55, pl. 19, here referred to, mentions knights; but the serjeants are added by Lord C. J. Brooke.

(f) He may, however, be discharged from the office and rank of serjeant by the king's writ, *ante*, 36, 37, 194.

(g) Fort. de Laud. c. 51.

(h) See Herbert's *Antiquities of the Inns of Court*. And as to the rights of serjeants' wives, see Serjeant Hampson's case, 3 Mod. 89; *Morton v. Sir Francis Withen*, Skinn. 348.

(i) *Vide ante*, 173.

(k) "A dupondio, nummo, quasi duobus assibus æstimaretur." Alciat. lib. 4, de Verborum Significatione. And see Calv. Lex. in verbo.

(l) *Quære*.

Papinianistas (*a*). When they had proceeded farther, they called them *λότρας* (*b*), and lastly, *πρόλοτρας* (*c*); and the title and degree of Doctor of the Laws (*d*) I acknowledge to merit very much of respect and honour, as to the degree, and persons honoured with it. But such state and degree as this of Serjeants at Law, is not among the municipal lawyers of any other nation, though all kingdoms have their municipal laws and lawyers, as well as we.

Degrees are rewards of study and learning. Nec enim virtutem amplectimur ipsam, præmia si tollas. They are *ῥο βραβεῖον*, a spur to virtue, and witnesses of learning. And since, gentlemen, you have already obtained that depth in your profession as renders you capable of this degree, that resolution of all true lovers of learning is worthy of you.

1. To say, *senesco discens*; proceed in your studies still. Your predecessors, for their learning, have been often advised with by the judges, as appears in our books, and by the Parliament, as may be seen by the rolls thereof.

2. "By this degree, you become chief advocates of the common law (*e*), an attribute given by Fortescue, who was a serjeant (*f*), and chief justice (*g*), and lord chancellor (*h*).

(*a*) "Ne autem *tertii anni auditores*, quos Papinianistas vocant." *Præfatio secunda Digestorum*. "Hi autem dicebantur, quòd eis Papiniani librorum lectio proponeretur." *Calv. Lexic. in verbo*.

(*b*) "Sed quia solitum, anni quarti studiosos Græco, et consueto quodam, vocabulo, *λότρας* appellari, &c." *Præf. 1 Digestorum, § 5*. "Ut legum ænigmata possunt subtiliter et acutè dissolvere." *Alciat. lib. 4, de Verborum Significatione*, p. 579; and see Calvin, *Lex. verbo* *Lytæ*.

(*c*) Students in their fifth year: "Quibus si bene sese imbuerint, et in quinti anni, quo *prolytæ* nuncupantur, metas, constitutionum codicem tam legere, quam subtiliter intelligere, studeant." *Prima Præf. Digest. § 5*.

(*d*) *Ante*, 174. The degree of doctor seems to have been introduced in the 12th century, in consequence of that of "magister" having become too common. At Paris the first doctor was created in 1135, *De Vaines, Dictionn. de Diplomatique, voce* Docteur. This title does not appear to have been conferred in England until the reign of John, about the year 1207. Doctors, upon their first introduction, were comprised under the general title of *Magistri*.—*Spelman's Gloss. in verbo*. In 3 Rot. Parl. 51 a, we find "*Mestres en Theologie et Docteurs d'ambedeux Loys*," and *ibid.* 124 b. "*Maistres de Divinitee et Docteurs de Canoun et Civile*." In M. 34 Hen. VI., fo. 14, pl. 26, *Prisot, C. J. of Common Pleas*, in a case of *Thomas Lombard v. Horn*, respecting a grant of administration, says, "Nous voulons parler ovesque Docteurs, et estre advises." *Et vide ante*, 96, 131, 132.

(*e*) In a suit coram rege on the Morrow of St. Martin, 38 Henry III., between the Archbishop of Canterbury and the Bishop of Rochester, for not permitting the archbishop to distrain on three knights' fees, which the bishop

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It imports, no less than all antiquity hath appropriated unto sergeants at law, the practice of that great and universal court (i), where all that concerns meum and tuum, the inheritances and property of all the people of England, are heard and determined (j).

This degree, ordaining you to be chief advocates, (the duty of whom pertains to you to be performed, and may not be declined by you,) I hold it not impertinent to mention something to you of the duties of an advocate; which are some of them to the courts and some to clients.

To the courts of justice he owes reverence, they being the high tribunals of law, of which, Doctor and Student, and the statute of Marlebridge saith, Omnes, tam majores quàm minores, justitiam recipiant; and therefore great respect and reverence is due to them from all persons, and more from advocates than from any others (k).

2. An advocate owes to the court a just and true information. The zeal of his client's cause, as it must not transport him to irreverence, so it must not mislead him to untruths in his information of the court. The statute of Will. (l) 1, c. 29 (m), and the Mirror of Justices (n), agree in an excellent direction in this point.

"When a good cause is destroyed by misinformations or unlawful subtleties or deceits, let the instruments thereof take heed of the wo denounced by the Prophet against them that call good evil and evil good, that put darkness for light and light for darkness, their root shall be rottenness, and shall go up as dust (o)."

Remember that in your oath (p), for one verb [you shall serve] you have two adverbs [well and truly].

held of the archbishop for aid to make the king's eldest son (afterwards Edw. I.) a knight, by causing the sheriff to deliver the distresses taken, the bishop pleaded and the archbishop replied; after which, before the subsequent pleadings between the parties, is the following entry: "Et Abell. de Sancto Martino venit et narravit pro episcopo; et non fuit advocatus. Ideo in misericordia, custod." Plac. in Domo Cap. Westm. Abb. 137 a, b. And see ante, 170.

(f) In 1430, king's serjeant, 1441.

(g) In 1442.

(h) To Henry VI.

(i) Magnus Bancus, ante, 10, 172.

(j) "As the Lord Nottingham, in one of his speeches expresseth, the law is there at home." North's Life of Lord Guilford, Roscoe's edition, i. 31.

(k) Ante, 31.

(l) Misprinted for "Westm."

(m) Ante, 71, 72.

(n) Ante, 31.

(o) Isaiah, chap. v. verses 20 & 24; and see verse 23.

(p) Ante, 13, 31.

The duties of advocates to their clients are general and particular.

The general consist in three things,—secrecy, diligence, and fidelity.

1. For secrecy: advocates are a kind of confessors, and ought to be such, to whom the client may with confidence lay open his evidences, and the naked truth of his case, sub sigillo, and he ought not to discover them to his client's prejudice (a); nor will the law compel him to it (b).

2. For diligence: much is required in an advocate in receiving instructions, not only by breviate (c), but by looking into the books themselves, in perusing deeds, in drawing conveyances and pleas, in studying the points in law, and in giving a constant and careful attendance and endeavour in his clients' causes.

3. For fidelity: it is accounted *vinculum societatis*. The name of unfaithfulness is hateful in all; and more in advocates than others, whom the client trusts with his livelihood, without which his life is irksome; and the unfaithfulness or fraud of the one is the ruin of the other (d).

Virgil, in his fiction of Æneas going down to Hell, sets these in the front of crimes,—

Hic, quibus invisi fratres, dum vita manebat,

Pulsatusve parens, aut *fraus innexa clienti*,

Inclusi poenam expectant (e).

For your duty to particular clients you may consider, that some are rich, yet with such there must be no endeavour to lengthen causes, to continue fees. Some are poor, yet their business must not be neglected if their cause be honest; they are not the worst clients, though they fill not your purses, they will fill the ears of God with prayers for you, and he who is the defender of the poor will repay your charity. Some clients are of mean capacity; you must take the more pains to instruct yourself to understand their business. Some are of quick capacity and confidence, yet you must not trust to their information. Some are peaceable, detain them not, but send them home the sooner. Some are contentious, advise them to reconciliation with their adversary. Amongst your clients and all others, endeavour to gain and preserve that estimation and respect which

(a) The cases upon this point are collected, 1 Vin. Abr. 456.

(b) See *Duchess of Kingston's case*, 22 Howell's State Trials, 538.

(c) "Briefs." The word *breviate* is used by Roger North.

(d) See an indictment against counsel for taking fees on both sides. Trem. P. C. 261.

(e) *Æn.* lib. vi. 609.

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is due to your degree, and to a just, honest, and discreet person. Among your neighbours in the country, never foment but pacify contentions. The French proverb is,

Bonne terre, mauvais chemin ;

Bon advocat, mauvais voisin.

I hope this will never, by any here, be turned into English.

The next and last words which I shall note in your writ are *Servientes ad legem*. The name Sergeant is ancient, some would fetch it from the French word Sergeant, as Pasquier in his *Researches* (a); but that word is also Saxon (b). You are indeed *servientes*, but it is *ad legem*, your fee is *honorarium*, and you are or ought to be, *patroni clientium, viduæ et orphano adjutores*.

The conservators of the peace (as in my Lord Coke's Preface to his 10 Rep.) were anciently called *Servientes pacis* (c); and the tenure by Grand Serjeantry (d) is the most honorable (e).

Sergeants were also called in Latin, *Narratores* (f), as my Lord Coke (g) and Sir Roger Owen (h) observe. And in the Book in the Tower, 14 E. II. f. 89, one prays that he may have—

(a) Pasquier says (*Récherches de la France*, liv. viii. chap. xix. p. 688), "Aussi nos vieux François fèrent du latin *serviens* un *sergiens*, que nous avons depuis appellé *Sergent*. Dans la vieille histoire de S. Denis en la vie du Debonnaire, l'auteur appelle les serviteurs de Dieu, *sergens de Dieu*. En la vie du Begue les Evesques de France, escrivant a Jean Pape de Rome, s'appellent *Sergens et disciples de la saincte Authorité*. Et dedans le Roman de la Rose les amoureux sont souvent appellez *Sergiens d'Amour*; mais surtout je vous veux coter un passage très exprès du Roman de Guerin de Mortbrune.

Si advint qu'un *Sergiens* qui à la cour repairoit,
Feut pris de larrecin, des anneaux qu'il embloit.
La vieille vint à luy en la prison tout droit,
Si luy dit: Mon amy, le tien corps mourir doit;
Mais si faire voloies ce que l'on te droit,
Tu serois delivré, et mis hors du befoit.
Dame, dy ly varlets, qui de cœur l'escoutoit,
Il n'est rien en ce monde qui (que) mon corps ne feroit
Pour garentir &c."

(b) *Quere*.

(c) *Ante*, 32; 5 Rot. Parl. 541 b; 6 Rot. Parl. 380 b, 466 a; and as to the office of Grytserjeant (serjeant of the peace), in hundreds, see Plac. in Dom. Cap. Westm. Abbr. 142. As to *Gritbreach* (breach of the peace), see Rot. Parl. 27 b; 115 a. *Communis impeditor pacis* occurs Plac. in Dom. Cap. Westm. asserv. Abbr. 303 a.

(d) Every barony, it is said, was held by grand serjeanty, 2 Co. Rep. 81 a; 6 Co. Rep. 74 a. The ushery of the Exchequer (*Magistratus hostiaræ de Scaccario*), to which the ushery of the Common Pleas is annexed (Rot. Orig. in Scac. 69 b; Hind v. Dagworth, 8 Edw. III. fo. 10, pl. 47, *ante*, 179), is held by grand serjeanty. Dyer, 2, 13; Sir W. Jones, 111.

(e) And see Co. Litt. 105 b, 108 a, 222 b.

(f) *Vide ante*, 172.

(g) *Ante*, 32, 191, 192 (a).

(h) See Harl MSS.; 1 Reeves, Hist. Engl. Law, 8.

Narratores in placitis ipsum tangentibus, notwithstanding the laws in Wales (a).

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In the records in the Treasury, 25 E. I. one Thomas Marshall justified the maintenance of a cause, for that he was Communis serviens—narrator, coram justitiariis, et alibi, ubi melius ad hoc conduci poterit, and, as a counsellor, he advised him (b).

They were antiently called likewise Countors, as is noted by Sir Roger Owen (c) and my Lord Coke (d), because the count comprehendeth the substance of the original writ, and the foundation of the suit; and of that part (as the worthiest) they took their name, and lost it not in the reign of Edw. I.; and at this day every sergeant, at his creation, doth count in some real action at the Common Pleas bar. In the statute of W. 19 E. I. (e) he is called Sergeant-countor; and in the statute 28 E. I. c. 11, is this clause, Nest my a entender que home ne poet auer council des countors et des sages gents (e).

Chaucer calls them Countors (f), and in the Mirror of Justices there is a chapter of Countors (g), the like in the Grand Coustumier of Normandy (h), and in the text and gloss of both

(a) Ad petitionem Abbatis de Alba Landa, peten. quod Dominus Rex eis concedat per literas suas patentes, quod, non obstantibus legibus Wallie, quod ipse et tenentes possint habere narratores in placitis ipsos tangentibus, ita responsum est: Le Roy ne voet mye que les leys soient chaungez; 1 Rot. Parl. 380 a. In 15 & 16 Edw. II. (1322), the Commonalty of South Wales prayed that in all plaints argued in the king's court, they might answer *by serjeant*, and that the plaint might be tried by twelve men. *Ibid.* 387 a.

(b) Plac. in Dom. Cap. Westm. asserv. Abbr. 237, ante, 170. In that case it was held, that, pending an attaint, an action of conspiracy would not lie against one of the recognitors of the assise. It would appear, therefore, that, but for the pendency of the attaint, a writ of conspiracy would then have lain; and see the record at length, post, No. LXVIII.

(c) See Harl. MSS., 1 Reeves, Hist. Engl. Law, 8.

(d) *Ante*, 32, 191, 192 (a).

(e) *Ante*, 32.

(f) *Ante*, Appendix, No. XII.

(g) *Ante*, 30.

(h) 64.—De Conteurs. Il est appel le conteur que aucun establit a parler et conter pour soy en court. Si (post, 233) doibvent les parolles autant valoir come se elles yssoient de la bouche a celui qui le establit a parler pour luy. Et ne peut en riens contredire chose que son conteur die en jugement pour sa cause. Non pourtant, quand il voudra, il le pourra changer et establis ung aultre: car deux conteurs ne doibt aucun avoir ensemble. Se aucun establist ainsi son conteur, cestuy doibt parler pour moy contre cestuy oyes lay (qu.): et quand il aura dict pour moy ce que luy ay enjoinct, je le garantiray. La justice le doibt ouyr et puis demander a celui qui la establi, sil a dict pour luy ce quil a dict. Sil le garantit, il ne pourra puis contredire riens quil ait dict. Se cil dict que il a dict aucune chose dont il ne le garantit pas, le conteur lamendera, et la court jugera des choses que sont garanties. Cil sagement establit son conteur

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these Countours are agreed to be advocates who plead and defend men's causes in judicial courts (*a*).

The rest of the words of your writ prefix a day (*b*), and command you to prepare yourselves to take this state and degree upon you. Accordingly some of you have formerly appeared upon your writs, which have been ordered to be filed, and your appearances recorded.

The rest of you have now appeared upon your writs, which have been read, and the like order given, as for the others; and we are ready to admit you to take your oaths.

And what honour and advantage hath been gained by any the most eminent of your predecessors in this degree, I do heartily wish may be multiplied unto you, Mr. Sergeant St. John, and to all the rest of these worthy gentlemen, your brethren.—White-lock's Memorials, 352-3-4-5.

No. XXXIII. (*c*)

Cancellation of Record.

In 12 Edw. II., the parliament made the following order for cancelling the charters and muniments granting the Earldom of Cornwall to Piers de Gaveston and Margaret, his wife (*d*).

“ And that the charters and writings thereof, by the lord the king in any manner soever made, be restored into the chancery of the lord the king, and be there *cancelled*; and that the inrolments thereof had in the said chancery, be *quashed* and *annulled*, and that this judgment be entered on the rolls of parliament, and in the chancery, and be thence sent to the exchequer, and

qui lestableit en ceste forme. Car aucun sage homme ne doit garantir les choses qui sont a dire, mais celles qui sont dictes, se il voit que ce soit bien.

65.—De Attourne. Attourne est cil qui est attourne, par devant la justice, pour aucun, en eschequer ou en lassise ou il y ad record, a poursuyr ou a defendre sa querelle et sa droicture; et si doit estre receu en tiel estat de la querelle comme cil qui lattournera; et lattourne ne doit de riens estre ouy dalcune querelle fors de celle dont il est attourne. And see *post*.

(*a*) In the gloss upon the 64th chapter of the Coustumier, the term “*conter*” is not limited to counting or declaring, but is applied to all the pleadings, as well those of the defendant as those of the plaintiff. And see *ante*, 174.

(*b*) *Ante*, Appendix, No. XII.

(*c*) *Ante*, 166.

(*d*) Margaret, sister of Gilbert de Clare, Earl of Gloucester, niece to the king, divorced for consanguinity from Edmund, Earl of Cornwall, her first cousin once removed (Oncle à la mode de Bretagne, Welch uncle,), afterwards widow of Gaveston, and at this time wife of her co-suppliant, Hugh de Audeley. 3 Mann. & Ryl. 155, 337, 465, 479; 1 Rot. Parl. 166 a, 171 b, 363 a, 355 a.

to either bench, and in the said exchequer and benches, be inrolled in perpetuam memoriam."

The writ to the barons of the exchequer, to the above effect, is then set out; after which the entry is, "Eodem modo mandatum est justiciariis de Banco, mutatis mutandis; et Henrico le Scrop et sociis suis, justiciariis, ad placita coram Rege tenenda, assignatis." (a)

In 16 Edw. II. a commission was sent to the sheriff of every county, directing the assessment of a tenth upon movables, granted by the earls, barons, knights, freemen, and commonalty of the counties, and a sixth upon movables, granted by the citizens and burgesses; and commanding that a former commission, in which the sixth was omitted, should be returned into chancery to be *cancelled* (b).

In 7 Richard II. 1383 (c), there is entered a favourable answer *by the lords* to a petition of the commons, with this note in the margin. "Responsio vacat, quia sic non placuit Domino Regi pro tunc illud concedere. Et ideo *cancellatur et dampnatur*."

In 11 & 12 Henry VI. 1433 (d), Sir Robert Shottesbrook presented a petition to the Commons, stating that certain letters-patent, which he had accepted "per negligence et innocencie, et saunz counsell de ley (e)," contained a clause which had been construed to his disadvantage in the exchequer, and praying that they would request the king to grant a privy seal, directing the chancellor to receive the letters-patent from the suppliant, Shottesbrook, to *cancel* them, and to seal others in a different form. The petition was indorsed, "Soit baille au Roy," and was answered "Fiat, prout petitur." (f)

No. XXXIV. (g)

Action for Money had and received, to try Right to an Office.

The right to an office to which the party has been admitted, or which he is entitled to exercise without any formal admittance, may be tried by suing the intruder in debt, or assumpsit,

(a) 1 Rot. Parl. 453.

(b) Ibid. 457.

(c) 3 Rot. Parl. 159 b.

(d) 4 Rot. Parl. 471.

(e) And see *post*, No. LXII.

(f) And see 2 Rot. Parl. 5 b, 22 a, 139 b, 298 b, 424 b; 3 Rot. Parl. 177 b, 271 b, 452 b, 544 b; 4 Rot. Parl. 199 b; Mann. Exch. Pract. 2d ed. 91, 172 (f), 137 (a), 376 (s).

(g) *Ante*, 151, 152, 156; Hardres, 334.

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for the amount of fees received by him, treating it as so much money received by him to the use of the legitimate officer.

As to the origin of this mode of trying the title to an office, see Howard v. Wood, Sir T. Jones, 126, 127, 128; S. C. 2 Show. 21, 24; S. C. 2 Levinz, 145; S. C. Freeman, 473, 478, and Mr. Smirke's notes there. Earl of Montague v. Lord Preston, 2 Ventris, 170, 171. This action lies to try the right to the office of under-crier, and usher of the Court of King's Bench. Green v. Hewitt, Peake, N. P. C. And see F. N. B. 172 k, note (a); Rex v. Bishop of Chester, 1 T. R. 396, 403; Powell v. Milbank, ib. 399 n.; Boyter v. Dodsworth, 6 T. R. 681.

No. XXXV. (a)

Terms of the Reference to the Judicial Committee of the Privy Council in the Mauritius Case.

Extract of Letter from Lord Glenelg to the Lord President of the Council, dated the 26th May, 1836.

“ In order to enable the executive government to decide on the surest grounds as to the course which, on so momentous a question, it is their duty to pursue, it is highly expedient to obtain the most authoritative interpretation which the institutions of this country can afford, of the question of law (abstracted from all other considerations) *whether the absence of a registry of Slaves, first in 1832, and then in 1834, under the circumstances stated in the accompanying papers, does or does not, under the provisions of the Slavery Abolition Act, entitle the late slave population of Mauritius to the immediate enjoyment of their unqualified freedom.* I have therefore to request that your lordship would move His Majesty in council, to refer to the judicial committee of the privy council this question of law, for their decision.”

It is understood that the recommendation of the judicial committee was (b), adopting the affirmative of the words of the reference (*in italics*), to the effect, that the slave population of Mauritius were not entitled to their unqualified freedom.

(a) *Ante*, 157.

(b) The original report has not, however, been seen.

No. XXXVI. (a)

Appendix.*Deccan Prize Money.*

In 1818, Poonah, the Concan, and the Southern Mahratta country, forming part of that portion of Southern India known by the name of the British Deccan, were conquered from their former sovereign, the Peishwa. At the time of the conquest, there was due to the Peishwa, as succeeding to the rights of the Great Mogul, an arrear of debt or tribute, called the Chowte, being one-fourth part of the Khuranji, which was one-third part of the produce of the land. In satisfaction of this arrear, and in discharge of future liability to Chowte, the East India Company accepted from the Nizam of the Deccan, from whom the tribute was payable, a cession of land. Upon this a claim was set up by the Anglo-Indian army, insisting that the arrear of Chowte was to be considered as booty divisible amongst the soldiers by whom the conquest was achieved, by virtue of the grant of booty from the crown.

It is understood that the right of the army to this arrear, was the question upon which the crown required the opinion of the Privy Council.

No. XXXVII. (b)

For what, a Writ of Assise would (c) lie.

At common law, assise lay only of lands, tenements, rents, and such things, for which a præcipe quod reddat (c) lay, and of common of pasture for cattle (d). The statute of Westminster 2, c. 25, gave an assise of novel disseisin, in lieu of a quod permittat, for *profits-apprender* in certo loco (e). An assise lay of an office at common law; but Lord Coke says, that this is meant of an office of *profit*, and not of an office of charge and no profit; for which he cites 27 Hen. VIII. 12, and 31 Edw. I. Assise 440 (f). The case in 27 Hen. VIII. (T. 27 Hen. VIII. fo. 12, pl. 32,) was a discussion upon a question put by Knight to the justices, whether præcipe quod reddat would lie de custodia forestæ. They were of opinion that it would; but nothing was said as to the necessity of profits to support a præcipe or an assise. T. 31 Edw. III. Fitz. Abr. Assise, pl. 440, which is

(a) *Ante*, 158. (b) *Ante*, 130. (c) Before 3 & 4 Will. IV. c. 27.(d) John Webb's case, 8 Co. Rep. 46 a. (e) And see *ante*, 179.

(f) 8 Co. Rep. 47 b; 2 Inst. 412.

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evidently the other case referred to by Lord Coke, was an assise of novel disseisin against the abbot of G., for depriving the plaintiff of a passage over the abbot's water to a church, in the plaintiff's own boat. The writ was not sought to be supported by the common law, but it was contended, that it was good within the statute of Westminster 2. The court was of a contrary opinion, and abated the writ.

No. XXXVIII. (a)

Privilege of Serjeants to be sued by Original Writ.

Paston, Kat. v. Genney, Serjt. 1471 (b).

Sir *John Paston*, knight, sued a bill of debt upon an obligation against *W. Genney* (c), serjeant at law, then being at the bar, &c.

Genney said (d), that he appeared at the bar to plead and minister the matter of his client, at the bar &c., and he did not understand that he should be put to answer to that bill &c., and it was debated, whether he should be put to answer as a minister, or filacer, or attorney of the place, should be: sed non interfui. And afterwards, *Genney* appeared to the bill, and said, that he was serjeant at law, and that he and all serjeants at law, from the time of which &c., have been impleaded by writ original, and not by bill &c., and he prays judgment if on this bill the Court will hold plea &c.; and the plaintiff said, that because the defendant appeared and said nothing in bar, &c. he prayed judgment, and his debt and damages.

Fairfax, Serjt. (e)—Sir, the plea is not good, for the prescription is void, inasmuch as the serjeants cannot prescribe; for they are not corporate &c.; and also they prescribe in the negative, to wit, that they have not been used to be impleaded by bill, whereas such prescription is bad &c. nor could we have traverse to this plea, to wit, whether it has been used or not.

Catesby, Serjt.—On the contrary. As to the first objection, that they are not corporate, and that therefore they cannot prescribe, Sir, attorneys and ministers of this Place may prescribe to have the privilege of this Place to be impleaded here &c., and yet they are not corporate &c. but they prescribe according to their custom &c. And, Sir, as to that which is said, that a man

(a) The greater part of the argument is stated and commented on, *ante*, 134. And see *post*, 234.

(b) T. 11 Edw. IV. fo. 2, pl. 4.

(c) William Genney or Jenney, called serjeant 4 Edw. IV. (1464), justice of K. B. 15 Edw. IV. (1478).

(d) See the pleadings, *post*, 234.

(e) Serjeant 4 Edw. IV. (1464), justice of K. B. 15 Edw. IV. (1478).

cannot prescribe in the negative, I admit (voile) that in a mere negative a man cannot prescribe ; but in a negative pregnant, or in the affirmative, a man may prescribe ; for it is a good plea to say, that all the inhabitants of Dale have used to pay but a penny for toll, and not more : So here, we prescribe in the affirmative, to wit, that they have been impleaded by writ, &c. and afterwards in the negative, (*e. g.*) and not by bill &c.

LITTLETON, J. and BRYAN, C. J. concess., and said, that when a man is impleaded of land within Cinque Ports (*a*) he shall say—ubi breve domini regis non currit, a tempore cujus &c. and this is in the negative &c. ; also when a writ comes to certify the privilege of one of the clerks of the chancery, the writ is, that they have been impleaded there and not elsewhere &c.

Catesby, Serjt.—As to that which is said, that they cannot have answer to our plea, to traverse the use &c., this shall be tried &c. As if an attorney of this Place were impleaded in London, and should say, that he was an attorney or filacer of this Place, and had used to be impleaded here, and no where else, &c. the plaintiff could traverse the custom &c. to say that he had not the use ; and that should be tried by the country.

BRYAN, C. J.—Such a plea is good without naming that he is an officer of this Place.

Catesby, Serjt., and Choke, Serjt., negaverunt.

BRYAN, C. J.—The privilege of this Place does not appear (*b*) to them in London ; and therefore, if it be traversed, it cannot be tried by the country ; for it is a custom in a court of record ; on account of which, at least, it is necessary to give a day to the party to bring a writ testifying the same custom &c.

Fairfax, Serjt.—It has been said that one can prescribe in the negative or affirmative, *ut supra* ; Sir, I agree to that, where the affirmative is material, and of effect &c. ; but the prescription here in the affirmative is void, for it is common law that every one may be impleaded by writ original ; and so in effect his complaint is not other but that he had been used to be impleaded by bill, which is a mere negative &c. And, Sir, every one who will take away the jurisdiction of this court, is bound to give jurisdiction to another court ; but so he has not done here &c.

Catesby, Serjt.—We have given jurisdiction to this same court by another form, *sc.* by original writ &c. Sir, it is common law that a tenant in antient demesne (*c*), or in the Cinque

(*a*) And see 1 Rot. Orig. in Cur. Scacc. 150.

(*b*) *i. e.* they cannot take judicial notice of such privilege.

(*c*) And see Plac. in Dom. Cap. Westm. asserv. Abbr. 117, 210, 222.
“ Licet cuilibet capitali domino (*immediate* lord, Madox, Baron. Anglic. 161,

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Ports (a) should not be impleaded in this court &c. Still, if such a person should be impleaded here, it would not be a plea to say, that the land was held of such a one of his manor of D., which manor is of antient demesne (b) &c.; or that it is in the Cinque Ports; but it must be shewn also, how the parties should be impleaded &c. sc. how they have been used to be impleaded, by little writ of right close within the same manor, from time &c.; so here we have said that he should not be impleaded by bill, but we have shewn the manner in which he should be impleaded &c.; and, Sir, in the King's Bench, a man who is in the custody of the marshal shall be put to answer to a bill, for it has been used—here a man who is in the custody of the warden of the Fleet shall not be put to answer to a bill, because it has not been so used; so, if the serjeants have not been accustomed to be impleaded by bill, this court has not jurisdiction to hold plea on this bill.

LITTLETON, J.—If a man should be impleaded in the city of London, and a custom should be alleged of the city, there the party has not traverse to that; for it appears to the judges what custom they have &c.: but if a man here, allege a custom in London, that shall be traversed &c., tried by the country &c. So if a man impleaded in this court allege a custom of this court, it shall not be traversed, but be tried by the judges; but if an officer of this Place should be impleaded in the King's Bench, and he pleads the custom and privilege of this Place, the party may have his traverse of the usage, and it shall be tried by the country &c.: and, Sir, if the cook or the butler of a judge here, or one of the officers of this Place, be impleaded in the King's Bench, they shall have the privilege of this Place &c., and yet a bill does not lie against them; for so it has not been used &c. So if we find here in our discretion, that the serjeants have not been used to be impleaded by bill, we abate this bill. And so it appears that upon the usage depends the matter.

BRYAN, C. J.—If the usage should be tried by our discretion, as we all agree, then the plea of prescription is but void; for although he had not alleged this, we ought to have adjudged it *ex officio*, &c. So in effect he says nothing, but that he should be condemned for want of answer: and, Sir, it appears to me, that he should be impleaded by bill; for a serjeant is a minister of the

183,) *mutare antiquum dominicum in liberum tenementum.*—*Mad. B. A.* 233, 241. “*Nich’ de Meriot tenet Meriet in capite de domino Rege per servitium ij militum de conquestu Anglie, et scilicet, unum feodum de honore Glovernie et aliud de honore Morton.*”—*Testa de Nev.* 163 a. And see *Worsley’s Isle of Wight*, Appendix, xxviii. xxx. xxxiii. lxxxii.

(a) *Mad. B. A.* 56, 321. (b) *Ibid.* 150, 241, 246; 1 *Ellis, In. Dom.* 356.

court, without whom the court could not be served or used (occupie), for no one ought to plead here by other than serjeant &c., but an apprentice, and any other person in *his own matter*, shall be received to plead *elsewhere* (a); so that, for the same reason, this bill lies against a serjeant at law, as well as against an attorney; for truly (b) their attendance is more necessary, than is the attendance of the attorney; and, Sir, if a serjeant will not be of counsel here with a poor man by our assignment, we cannot make him not a serjeant, for he has this name given by the king, but we can *estrangle* so that he shall not be received to plead &c.: and, Sir, there is a difference between the members of the court and the ministers of the court, who are the officers and attorneys for the members who occupy here of record, whether they be impleadable here by bill, because they shall be required to do their offices, and if they made default they should be forejudged of their offices &c.; but a sheriff is a minister to receive writs and return them, and bill does not lie against him, for his occupation is in the country, sc. in his county &c.; and so is an ordinary who comes to have a clerk delivered to him (c), he is a minister to the court at this time, and no bill lies against him &c.; and so there is a diversity between a minister, member of the court &c., and because a serjeant is a member of the court, it seems that a bill lies against him.

CHORKE, J.—Serjeant at law is not bound to attend upon this court except at his will (d); for he is not sworn to attend upon this court (e),—as an attorney,—but he is sworn that he will not *delay* the people &c.; but if he will not be of counsel by our assignment, we can *estrangle* him from the bar as to any plea, &c. And, Sir, I have seen here, where an apprentice took challenge to the jury, and gave evidence, in default of his serjeant &c. (f) And, Sir, if a man be bail for one, and will bring him at his day, he shall have the privilege of this place, and still no bill lies against him; so it is of a prisoner in this court &c., and of a disseisin of an officer in this court, or rasing a record here, that shall be tried by the filacers and attorneys who attend here in the court (g); and no serjeant has been put in the panel in such a case.

(a) *Vide post*, Appendix, No. LXXI.

(b) "Si," *vide ante*, 225, n.; *post*, (c) *Com. Dig. Justices*, (Y).

(d) *Ante*, 29, 217 (a), *post*, 236, n.

(e) But in *Hambleton v. Scroggs*, Justice, and others, North, C. J., is reported to have said, "That a serjeant at law is bound by his oath, to be there (in C. P.); and when he brings a writ of privilege, it is always out of that court, and no other." 2 Mod. 296; *post*, 236; and see *Dyer*, 24 a.

(f) This would seem therefore to have been an unusual occurrence. *Vide post*, No. LXVIII. 332.

(g) See *Tidd*, 6th ed. 51, 9th ed. 88.

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LITTLETON, J.—If all the serjeants were dead, we could hear the apprentices to plead here by necessity, in ease of the people &c.

BRYAN, C. J.—Then, according to you, no serjeant shall be made for necessity (a) &c.

Genney, Serjt.—I have seen my master, Cheine (b), chief justice of the King's Bench, come into this court and require the serjeants to be of counsel in a plea that was before him, and if they would not, he would have forejudged them from pleading in the King's Bench.

LITTLETON, J.—And well he might (b'n potuit.)

Genney, Serjt.—The statute of Westm. 1, c. 29 (a), wills, that if a countour or other shall do deceit to the court, that he shall have imprisonment for one year, and that he shall not be here any more in court; and this statute is not intended of serjeants at law only, for if an apprentice be found in deceit of this court he shall have the same punishment; and, Sir, if an apprentice in the King's Bench be not of counsel by assignment (c), the justices can oust him from the bar &c. (d)

The Pleadings in the above case, as preserved by Rastell.

Bill and Declaration.

Memorandum—That on the 10th day of October in this same term, J. Paston, Knt., in his own proper person, exhibited to the justices here a bill against W. Jenney, Serjeant at Law, present here in court, the tenor of which bill follows in these words:—J. P., Knt., complains of W. J., Serjeant at Law, present here in court, for that the said W. unjustly detains from and does not render to the said J. 20*l.* which he owes him &c. for this, to wit, that whereas the said W., on &c. at the town of W. by his certain writing obligatory, granted that he was held &c. and to be paid &c.; wherefore he says &c.; and thereof he prays relief &c., and he brings here &c. pledges to prosecute A. C. and B. D.

Plea in Abatement of the Bill.

And the said W. J., in his own proper person, comes and says that serjeants at law, by the law of the land, have inherited and are inheritable (*hereditati et hereditabiles existunt*), and from time whereof the memory of man is not to the contrary, have inherited to be impleaded, and have been impleaded in this court by original writs issuing out of the Chancery of our lord the king, and not by bill in the form aforesaid; and this he is ready

(a) *Ante*, 32, 71, 72; *post*.

(b) Chief Justice of K. B. 1424.

(c) i. e. refuses to be of counsel, when assigned.

(d) Dyer, 71 b; Justice Mitchell's case, 2 Atk. 173; *Butler v. Freeman*, Amb. 304; Maurice Savage's case, 1 Dougl. 356; *post*, No. LXX.

to verify as the court &c.; wherefore he does not intend that the said court of the lord the king here will take cognizance of the plea aforesaid without an original writ sued out of Chancery as aforesaid &c.

Demurrer.

And the said J. P. says, that to the matter of the said W. above alleged, he is not obliged, nor by the law of the land is bound, to answer; wherefore for that the said W. hath appeared to the said bill and makes to it no defence, nor in any way pleads in bar of the said bill, he prays judgment and his debt aforesaid, together with his damages by reason of the detention of his debt to be adjudged to him &c.

Joinder in Demurrer.

And the said W., for that he has above alleged sufficient matter to take away the jurisdiction of the said court from taking cognizance of the aforesaid plea without writ original sued out of Chancery as aforesaid, and that the said W. is ready to verify that matter &c., which matter indeed the said J. P. has not denied, nor to it in any way answered, prays judgment, if the said court will take cognizance of the aforesaid plea, without writ original &c.—Rast. Ent. 178 c.

No. XXXIX. (a)

Further as to the Privileges of Serjeants, when Parties to an Action.

In Dyer, 24 a, Englefield, J. said, that a serjeant might sue by writ of privilege in an action brought by him as heir, and that he himself had brought such an action when he was serjeant, against an abbot, who paid the debt; but Fitzherbert, J. thought that a serjeant, suing as heir, was not entitled to privilege.

In Hambleton v. Scroggs and others (b), it was in K. B. held, that a serjeant may be sued in that Court by original (c), his practice not being confined to the Common Pleas. The case is thus reported by Levinz. "In battery against them, Gilby pleaded son assault demesne; Scroggs pleaded his privilege of serjeants to be suable only in C. B., upon which the plaintiff demurred, because he is not a sole defendant, but sued jointly with another.

(a) *Ante*, 134.

(b) 2 Mod. 296; 2 Levinz, 129; shortly reported 3 Keble, 424.

(c) The jurisdiction of the Court of King's Bench to hold plea of debt &c. by writ, was then a recent usurpation on the part of that Court. *Vide* Com. Dig. title Courts (B. 2.); 4 Inst. 76; 3 Bla. Comm. 43; *ante*, 44, n. (c).

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It was argued on his behalf, that serjeants and their servants have privilege of being only suable in Com. Banco, 1 Cro. Serjeant Hoskins's Man's Case (a); and further, as to the being joined in one action, that where the action is joint and cannot be severed, there, if the defendants be sued jointly, the privilege of one is lost for want of privilege in the other (b). But where the action is severable, as in this case, the want of privilege in one defendant ought not to toll the privilege of the other.

CURIA.—A serjeant has no privilege against any Court of Westminster, for he may practise in any court of Westminster; and, in fact, they do practise in all courts of Westminster, and are not confined to the Common Pleas (c). But if a serjeant be sued in any other court than at Westminster, he may plead his privilege. Whereupon a respondeas ouster was awarded."

A plea of privilege by a serjeant to the jurisdiction of the Court of King's Bench, was set aside for want of an affidavit that he practised exclusively in the Court of Common Pleas, in a case which is thus shortly reported by Sir John Strange (d). "He pleaded his privilege as a serjeant, with the writ (of privilege) annexed. But for want of an affidavit, that he had business there (e) and there only, the court set it aside" (f).

In Pasmore v. Goodwin, Serjeant (g), Serjeant Darnel moved for an imparlance till the next term, because the defendant *was an officer of the court* (h), and the bill was not filed against him, so as to give him eight days within term to plead; but the court held, that the day of the bill filed is one day, so that the plaintiff may give rules that day; also they agreed that Sundays and holidays are to be reckoned in. And the clerks said it was sufficient that he had four days in term; quod curia concessit. Mr. Clark said, that antiently there were two rules given, both

(a) Called Serjeant Headly's servant's case, Cro. Car. 84.

(b) Because otherwise the plaintiff would lose his remedy by joint action. And see Turbill's case, 1 Saund. 67.

(c) It was part of the exhortation usually addressed by the chief justice to the new serjeants, that they should "keep the Common Pleas bar."—See Herbert, Antiq. of Inns of Courts, 372. And see *ante*, 29, 217, n. (a), 233; Serjeant Maynard's case, North's Life of Guildford, i. 220, (Roscoe's ed.) i. 235; *post*, 279, No. LXXIII.

(d) Styles v. Mead, Serjeant, 2 Stra. 738.

(e) "There," of course, refers to the Common Pleas, though that court is not mentioned in the report, the whole of which is above set out.

(f) It does not appear from this short note, whether the defendant was sued by writ or by bill.

(g) 2 Salkeld's Reports, 517.

(h) *Post*, 263.

four day rules; the first was, *ad respondendum*, the second, *ad respondendum peremptoriè*; which two were now turned into one eight day rule.

Serjeants, when plaintiffs, may lay and retain the venue in Middlesex in transitory actions arising in another county (a).

No. XL.

*Vinter's case—Illegal Letters-patent revoked by the King,
(Edward IV.) ore tenus.*

Be it remembered, that Thomas Croyton, who held, exercised and occupied the offices of coroner and attorney of the lord the king before the king himself for so long time as he should well conduct himself in the same, by grant of the king himself by his letters-patent, (as by the inrolment of the said letters, remaining in the court of our lord the king before himself, appears of record,) on the last day of June last past died, whereby the said offices became vacant, and were without any officer occupying them. Whereupon, on the morrow after the death of the said Thomas, in the said court of the lord the king before the king himself at Westminster, came one Thomas Vinter in his proper person, and brought there in the said court letters patent of the said the lord the king, to the said Thomas Vinter and Thomas Croyton made, of those offices, as he said: And he prayed the court there, that by virtue of the said letters, he should be admitted to the said offices. And thereupon the justices of the said lord the king to hold pleas before &c., because the said offices are of great burthen and weight, touching as well the crown of the said lord the king as his advantage, and the commonwealth, and require that he who fills them be discreet, learned and expert in the said offices; and it is not possible that any one should sufficiently occupy and exercise the said offices, unless he have been brought up in the same from his youth, and has had long and great experience in the same: nor has it ever been seen that any one was admitted in the same court to exercise the said offices, unless he were one who had been brought up in those offices, or had continued a long time in other offices in the same court; and the said Thomas Vinter was neither brought up in those offices, nor in any office in the same court, as to the

(a) Pra. Reg. 420. And see the cases collected in the notes to Tidd's Practice, 9th edit. 601, 602; Serjeant Maynard's case, *ante*, 236(c).

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same justices sufficiently appears ; by reason of which the said Thomas Vinter is altogether unfit to occupy and exercise the said offices ; and the grant of the said offices made to the said Thomas Vinter, and the said letters patent of the lord the king made to the said Tho. C. and Tho. Vinter, were void in law ; and the said Thos. Vinter they refused to admit to those offices then and there for the advantage of the said king and of his people. And afterwards the justices of the said lord the king, to hold pleas &c. came into the presence of the said lord the king at Westminster, by command of the king himself, and being there questioned by the said lord the king as to the fitness and knowledge of the said Thos. Vinter to occupy and exercise the said offices, said that the said Thos. Vinter was unfit and inexpert in knowledge and exercise to occupy those offices for the advantage of the king and of his people, for that he never had any exercise in the said offices, or in any office of the said court, nor was he in any way skilled or brought up in the said offices or in any of them, nor had he ever continued in any other office of the said court. And being further questioned by the said lord the king, who there was that that might be fit to occupy and exercise the said offices for the advantage of the king himself and of his people, they said that one John West excelled others in his daily and continued knowledge and training in those offices, and that for 20 years he had remained in the said offices, and that he was expert and fit to occupy those offices ; wherefore the said lord the king, well weighing the premises, by word of mouth commanded John Markam, chief justice of the king himself, William Yelverton, knt., Richard Bingham, knt., and William Bacon (Laken), justices of the lord the king himself, &c., then there present, that they should admit the said John West to the said offices, and should take his oath that he would well and faithfully exercise the said offices, and that they should institute and cause to be placed the said John in those offices. By virtue of which precept, the said justices on the third day of July then next following, in the court of the said lord the king, before the king himself at Westminster, admitted and placed him in the occupation and exercise of the offices aforesaid ; and they took his oath, and instituted and placed him in the said offices, as in the said court of the lord the king more fully appears on record &c. And afterwards the said justices and the justices of the lord the king of the bench, being together in the Exchequer Chamber of the said lord the king, the said justices assigned to hold pleas before the king himself, informed the said justices of the bench

of all that they had done in the premises, enquiring from them whether it appeared to them that they had done well and lawfully or not: who said that the said justices &c. had in all things done well and lawfully. And afterwards, the said lord the king by letters patent under his signet, commanded the said justices assigned &c. that they should admit no one to hold or occupy the said offices, but only the said John West, according to the form and effect of the precept of the said lord the king delivered by word of mouth to the said justices assigned &c., before made as aforesaid, notwithstanding the said letters patent to the said Thomas Vinter to the contrary (a), commanding besides to the said justices that the said letters under the signet should be inrolled in the rolls of his own court aforesaid; as in the said letters of the said lord the king &c., here in the same court inrolled, more fully appears of record.—M. 5 Edw. IV. (1465), 2 Anders. 118; Dyer, 150 b.

No. XLI. (b)

Letter from Mr. Justice Windham (c) to Lord Burghley, 1st January, 1579-80, concerning certain persons fit to be called Serjeants.

My very good Lorde.—It may seme strange that I am so bold to wryte unto you, where I knowe It doth become farre better men than I am, to attend in pson upon your Honor, in any affayre they are to deale in with your Lordship; wherefor not want of dutye, but the cyrcumstances to be weighed in this manner of my advertysment, bredeth this boldnes in me to give you this understanding by wrytinge, for the dutye and zeale I owe to the good service of the comon welth; that whas there are certen names presented by the chyef justice (d) to my L Chancellor, of such persons as are thought by some meet to be called Serjants at this present, I have thought good to geve you some secret advertysment of two of them, that in respect of suspi-cyon of theyr religion, the state of the government myght very well spare them. The one is Mr. Maryott of the Inner Temple, somewhat backwards in religion (e), and I think at the last call

(a) In Dyer it is "prædictum T. V. contrarium petentem penitus recusant."

(b) *Ante*, 38.

(c) Sir James Dyer.

(d) Sir Thomas Bromley.

(e) Looking back to the old religion, semble. And see Dugd. Orig. Jurid. 280 a.

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theare omytted out of the bill for that cause. In whose steade theare might be very well placed one Mr. Walker, of the same howse, a doble reader, and known to be a very great practyser, and one not unknown to my Lord (a), but I think he was omytted by forgetfulnes. The other ys Walmsley (b), of Lyncolnes Inn, one lykewise not thought forward that waye (c); and therfor he was somewhiles kept from the call to the benche in that howse. And in his place there may be supplyed one Mr. Atkyns, a reader of that howse, and as auncient to any name (d) in the bill for that howse. He is knownen to be very well lerned, earnestly well affected in religion, and of good state of Lyvyng, and ys joyned in servyce in Wales with Mr. Puckering (e) in cyrcuite there; and I take yt he was lykewyse forgotten; for he ys very well accompted of all them that knowe him. This advertysment yt may please youre L to consyder of and securly to kepe, least my good zeal to the estate of this tyme may otherwyse brede me offence of those that regard not some of these qualities, that I take are so principally to be regarded in the choyse for this service; and so, praying pardon of my longe trobling your Honor, take my Leave, this present Weddysday, the xxviith of Januarie.

Directed,

Your L alwayes to commande,

To the Right Honorable the
Lord Burghley and Treas-
urer of England.

FRAUNCIS WINDAM (f).

Indorsed,

Mr. Justice Wyndham, to my L
Psons fitt to be chosen Sergeants.

And on a slip of paper by the same hand,
Of the Inner Temple, Mr. Walters.
Of Lyncolne's Inn, Mr. Atkyns (g).

(a) The Lord Chief Justice Dyer, by whom the bill, or list, of persons recommended as proper to be called to the degree of serjeants, was preferred.

(b) It appears, by Dugdale, that Walmsley, notwithstanding this cautionary letter of Mr. Justice Windham, was chosen and called to be, and became, Serjeant in 1580, and was made Justice of C. P. on the accession of James I. in 1603. As neither Walker nor Atkyns are included in Dugdale's list of serjeants, the suggestions contained in the above letter appear to have been little regarded.

(c) In the Protestant way, ut videtur.

(d) Senior to any person named.

(e) Serjeant 1580; Queen's Serjeant 1588; Lord Keeper 1592. Dugd. Chron. Jurid. 173, 175, 177. (f) Serjeant 1577; Justice of C. P. 1579.

(g) Transcribed from the MS. in Biblioth. Lansd. XXIX., No. 12.

No. XLII.

Appendix.*Common Serjeant of the City of London.*

This officer is called in old entries, sometimes communis serviens (a), less frequently communis serviens ad legem, sometimes communis narrator (b), sometimes communitatis narrator (c), the several terms being practically identical (d). Not being admitted to his office by virtue of the king's writ, he has no right of audience in the Common Pleas; but he takes precedence of those who are neither serjeants nor king's counsel, and he sits within the bar, at nisi prius, with a silk gown.

The Common Serjeant is mentioned in a charter of 12 Edw. II.

(a) "Et quod Camerarius, Communis Clericus, et Communis Serviens, Civitatis predictæ, per communitatem civitatis ejusdem elegantur et amoveantur."—Rot. Pat. 12 Edw. II. P. 2, M. 2.

"Robertus de Edenorsore, Skryveyne (scrivener), attachiatus fuit ad respondendum tam Domino Regi quam Johanni de Wentbrugge *Communi Servienti* civitatis London., qui pro Domino Rege et civitate sequitur, de diversis falsificationibus et deceptionibus per ipsum Robertum factis in civitate predictâ, &c."—41 Edw. III., City of London Letter-Book, G, fo. 189.

"Ad quem diem Johannes de Wentbrugge *Communis Serviens* in dictâ civitate, qui pro orphanis sequitur, monstravit prefatis Majori, Aldermannis, et Camerario, quod cum Thomas de Welford senior, civis et pannarius London., in testamento suo legasset Johanni filio suo decem marcas, &c."—42 Edw. III. *Ibid.* fo. 213.

(b) "Johannes Roche, Communis Narrator."—9 May, 50 Edw. III., 10 Oct. 6 Rich. II.; Letter-Book, H. folio 30.

"In congregacione Majoris et Aldermannorum ac communis Consilii civitatis London. in Camera superiori Guyhalde ejusdem civitatis, pro arduis dictæ civitatis negotiis expediendis, summonitorum, Johannes Weston, *Communis Narrator* ejusdem civitatis, tam ex parte dictæ civitatis quam cujusdam Johannis Bourere, Civis et Turnour ejusdem civitatis, iisdem Majori, Aldermannis et communi Consilio conquerendo monstrabat, quomodo, secundum dictæ civitatis consuetudines laudabiles hactenusque usitatas et approbatas, &c."—23 Nov. 4 Hen. IV. Letter-Book, I. fo. 17.

"Johannes Weston, *Communis Narrator* civitatis London., ad cujus officium de ratione pertinet, pro parte orphanorum dictæ civitatis, bona sibi qualitercumque pertinentia prosequi, monstravit Thomæ Fauconer, Majori, &c."—26 July, 3 Hen. V. *Ibid.* fo. 156.

(c) "Compotus Johannis Bryan, civis et piscenarii, redditus primo die Decembris anno regni Regis Ricardi Secundi quarto, in Camera Guyhall, London., coram Johanne Eston, Ricardo Aylesbury, Aldermannis, Ricardo Odyham, Camerario, et Radulpho Shode, *Communitatis Narratore*, auditoribus assignatis per WILLIELMUM WALWORTH tunc Majorem, pro tempore quo ipse Johannes Brian fuit custos corporis et cattallorum Alicie, filie Johannis Reigner, Bladarii, orphane dicte civitatis, ad instanciam Ricardi Fraunceys, piscenarii, tunc presentis."—1 Dec. 4 Rich. II. Letter-Book, H. folio 37.

(d) *Vide ante*, 31, 32, 72.

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1318 (a), which directs that the Chamberlain, Common Clerk (Town Clerk), and Common Serjeant be chosen by the commonalty (b).

The following statement of the duties of this officer, is taken from a valuable Report of the Municipal Corporation Commissioners for London and Southwark (c).

"The duties of the Common Serjeant are as follows : To preside daily in one of the Courts at the Old Bailey, under His Majesty's Commissions, during the sessions of oyer and terminer and gaol delivery for the city of London and county of Middlesex (for this purpose he is always named in the commission); to attend all meetings of the livery assembled in common hall, except for the election of members of parliament, and to report the choice of the livery to the court of Lord Mayor and Aldermen; to attend all courts of aldermen and courts of common council, and to be in council with them, unless engaged in any other court on behalf of the corporation, or excused by the Lord Mayor. His attendance on the court of aldermen is, however, not often required; and he is more properly the officer of the common council, as it is his duty to carry their bills to the aldermen; he attends more than half the number of courts of common council which are held in the year. His duty is also to attend the lord mayor on all public occasions; to attend all committees of the corporation when such attendance is required; to attend the judges on the first day of Michaelmas term; to advise in all cases relating to the corporation, where it may be necessary to take the opinion of counsel; to attend the Guildhall sessions whenever the corporation have business there, and to act as counsel for the city when called on in Westminster Hall, or elsewhere: to superintend the management of the Orphans' Estates (d), and to make out an inventory of the personal estate of deceased freemen dying intestate, upon application for investing their personal estate in the Orphans' Fund for the benefit of their orphans, and to examine and sign the deeds and securities before the same have passed the lord mayor and court of aldermen. For the last thirty years he has not been called upon to exercise this function.

Informations *ex officio* are also filed in the mayor's court, in

(a) See the preceding page, note (a).

(b) 1 Maitl. Hist. 115; Strype's Stow, Book V. p. 303; Norton, Comment. 431; North's Life of Guilford, (Roscoe's ed.) ii. 18.

(c) Second Report, 83.

(d) See the preceding page, note (c).

he name of the common serjeant, against persons obtaining their freedom fraudulently, or committing any offence subjecting them to disfranchisement. (a) This is not of common occurrence. The public duties of the Common Serjeant interfere materially with any private practice which he may have as a barrister.

His annual salary is 1000*l.* (b) He also receives fees on all cases and briefs which are sent to him on the part of the corporation. He has also some other trifling incidental emoluments; thus he receives annually 2*l.* 2*s.* (c) from the city impost on wine, received by the remembrancer, and a buck and a doe from the king's park.

His clerk receives 2*l.* 13*s.* 4*d.* annually for a livery."

No. XLIII.

Statutes to be surveyed by Judges and Serjeants, in order that they may be executed.—2 Rot. Parl. 276 a. 37 Edw. III. 1363.

The Commons pray also, that the Great Charter, the charter of the forest, and the statutes heretofore made, and chiefly the ordinance of the last parliament, be firmly held and kept; and that the justices of the one place and the other, and barons of the Exchequer, *the king's serjeants*, and other judges, be charged to survey the statutes and ordinances heretofore made, which have not yet been executed, and to shew to the great council; so that our lord the king may ordain that the executions be made according to the ordinances and establishments, as well for the profit of the king, as for the quiet and use of his people.

ANSWER.—It pleases the king that it be so; and if any one feel himself aggrieved against the form of any of the statutes, let him come and allege his grievance, and right shall be done to him without delay, according to the form and effect of the statutes.

(a) The judgment at St. Martin's-le-Grand upon a writ of error brought on a judgment in the Lord Mayor's Court, upon an information by Nugent, Common Serjeant, in 1775, against Plumbe, for disobeying a precept from the lord mayor to summon the liverymen of the Goldsmiths' Company, of which the defendant was warden, to meet on the 12th August, 1770, in Common Hall, to receive the royal answer to the address presented by the City in Beckford's mayoralty, is reported in a separate duodecimo volume, published in 1782 at the expense and for the purposes of the *Associated Livery*.

(b) Increased to 1500*l.* since the establishment of the Central Criminal Court, in 1834, under 4 & 5 Will. 4, c. 36. *Ante*, 175.

(c) This payment, it is understood, has not been received by the present common serjeant.

No. XLIV.

Royal Assent refused to Bill for Payment of Judges and Serjeants' Fees.—5 Rot. Parl. 490. 1 Edw. IV. 1461.

And also, that all Actis of Parlement afore this tyme made, for payment and contentation of fees, reward, and clothyng, of your Justices, Barons of your Exchequier, *Sergeauntes to youre Lawe*, and youre Attorney, be good, and in their force and effect, any statute, acte, or ordenaunce in this youre present Parliament made, notwithstanding.

Answer.—As to this article, hit is thought necessary that they be truly payed, but not to affirm their assignment of payment and contentation by auctoritie of Parlement, but that it be at the kyng's pleasure.

No. XLV.

Letter (a) under the Privy Signet, to Justices in a Special Assise in the County of Leicester, between Blount, Knight, and others, plaintiffs, and Hastynges, Esquire and others, defendants, requiring them to be cautious (b) in giving Judgment, and to allow both Parties to see the record.

Depar le Roy.

Chiers et foiauxlx—Nous vous prions (c), que touchante une espa'le assise prise devant vous en Contie de Leyc', p'entre n're foial Chivaler, Joh'n Blount (d), et n're ame Escuier (e), Joh'n Blaket (f), et autres, pleintifs, d'une part, et Richard Hastynges, Escuier (g), et autres, defendanz, dautre part, laquelle assise

(a) Communicated by the Rev. George Oliver, of St. Nicholas Priory, Exeter. The original is among the muniments of John, the 16th Earl of Shrewsbury. The tenor of this letter, and the circumstance of its bearing date at Eltham, (the favourite residence of Richard II. but not of his successor,) independently of the direction, tend to shew that it proceeded from the former prince. See notes (a) and (b) in the next page.

(b) As the assise had passed for the plaintiffs, the caution seems to be required by the king with a view to the interests of the defendants.

(c) It would be curious to ascertain at what period, and under what circumstances, such humble language was used by this prince.

(d) Vide Abbrev. Rot. Orig. 243, 70, 29.

(e) Ante, 193.

(f) Vide Rot. Pat. 280 b, m. 7.

(g) Qu. Whether this is the Richard Hastynges, who in 12 Henry IV. was restored in parliament to the lands forfeited by his brother Ralph, beheaded for treason 6 Henry IV. See 3 Rot. Parl. 633 a.

est passee pour lesdiz pleintifs, sicome entendu avons, vo' vuillez faire le record et proces du juggement par vous ent rendu ou a rendre, par bonne et meure delib'acion, sanz aucune haste en faire a la pursuyte de nullui, autrement q' le leye veult; Et que nosdiz Chivaler et Escuier pourront avoir veu du dit Record, devant que nulle copie en soit deliv'ee a aucun autre. Donne sousbs n're signet, a n're manoir de Eltham, le second jour de Ffevrier.

Indorsed,

A noz chiers et foiaulx, William Thirnyng(a), et Hugh Huls(b), noz Justices assignez en une espa'lle assise en Contie de Leyc', et ascun de eulx (c).

No. XLVI.

Extract from answer delivered in the House of Lords, 16 January, 1769, by Wilmot, C. J. of Common Pleas, on the opinion of all the judges present, upon the following question put to the judges. Whether an information filed by the king's solicitor-general during the vacancy of the office of the king's attorney-general, is good in law (d).

"I find no traces of such an officer for centuries after the Conquest; and that great antiquarian, Spelman, under the word 'Serviens ad Legem, considers him, upon the authority of pas-

(a) William Thirning was appointed justice of C. P. 11 April, 11 Rich. II. (1388). Dugd. Chron. Jurid. 109. He was a trier of petitions in 13 Rich. II. (3 Rot. Parl. 257), and in subsequent parliaments of Richard II. (*Ib.* 277, 284, 300, 309, 329, 337, 348,) and Henry IV. (*Ib.* 416, 455, 486, 523, 545, 567, 609, 623, 648; 4 Rot. Parl. 4.) In 1396-7, he was made chief justice of C. P. (Dugd. Chron. Jur. 111; 3 Rot. Parl. 358.) In 1399 he was appointed with others to receive from Richard II. his resignation of the crown (3 Rot. Parl. 416), was one of the commissioners to pronounce the sentence of deposition (*Ib.* 422); and, in the name of the proctors deputed by the three estates of the realm, stated that they resigned (more properly *renounced*) their homage and fealty to that prince (*Ib.* 423, 424). He was reappointed chief justice of C. P. by Henry IV. (Dugd. Chron. Jurid. 113; 3 Rot. Parl. 454, 455, 530, 578, 671; 4 Rot. Parl. 7, 17.)

(b) Hugh Hulse was appointed justice of K. B. 20 May, 12 Rich. II. (1389). He was a trier of petitions in 18 Rich. II. (3 Rot. Parl. 330), and in several subsequent parliaments. (*Ib.* 338, 348, 416, 455, 486, 523, 546, 568, 609, 623, 648; 4 Rot. Parl. 4, 16, 35.)

(c) And see 3 Rot. Parl. 311 a; North's Life of Guilford (Roscoe's ed.)

(d) Wilkes v. The King, Wilmot's Opinions, 328; 19 Howell's State Trials, 1129; Brown, P. C. 1st ed. vi. 345, 2nd ed. iv. 360.

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sages cited out of Bracton, as the great officer for pleas of the crown (a), and thinks the king had a serjeant in every county (b) for that purpose; and in the proclamation made even at this day before any criminal trial begins, the king's serjeant is mentioned even before the attorney; and the 5 Edw. III. c. 13, which gives an averment against the sheriff's return of imprisonment in cases of outlawry at the king's suit, mentions the king's serjeant before the attorney, and subjoins 'or any that will sue for the king,' (c) which is a strong indication that the king's suits were not considered as then appropriated to his attorney, and he had not then so much as the name of 'attorney-general,' which means no more than the person *generally* employed to sue and defend for the king, exactly in the same manner as the person generally employed by your lordships, in your suits, is called your lordships' attorney, without putting the addition of "general" to it (d); and the suits instituted by the king's attorney, or by your lordships' attorney, are both instituted either by special and particu-

(a) "Vicecomes vel serviens regis." Bract. 157 b.

(b) "Rex concessit Thomæ Chaumbre, ad placitum, officium scrutatoris et de water bailiffe, in portibus villarum de Corke, Yoghall, Kinsaille, Leperslond (qu. Lepers' Island, a lazaretto), et Dengle, in com' de Corke, et officium capitalis serjencie infra eundem comitat'."—Rot. Pat. 236.

"Rex constituit servientem suum (without saying *ad legem*) Thomam Covele, attornatum suum, ad negotia sua, coram ipso, prosequend'.

"Idem efficitur coronator ac attornatus regis in Banco suo."—Ibid. 236.

"Will'us de Lodyngton, attornatus Regis in Communi Banco, et in alijs locis quibuscunque, ad placitum regis."—Ibid. 237. Lodyngton, therefore, who not being a serjeant could not plead or be heard as an advocate in the Court of Common Pleas, was capable of performing, what at that time was considered as the proper business of the king's attorney. And see *post*, No. LXVI.

(c) The abbot of Fiscamp (Fécamp) was summoned to answer the lord the king of a plea by what warrant he holds the manor of Stennings, which is of ancient demesne of the crown of England, as is said: Whereupon William de Pensburg, who prosecutes for the king, says, that the Lord Henry the king, father of our lord the now king, was in seisin of the said manor. And the said William being asked, by whose command he brought that writ against the said abbot, or by whose authority, says, that he did it by his own proper authority, without command of the chancellor or other ministers of the king, for this that the attorney of the said abbot formerly denied before the king that the said manor was of the ancient demesne of the king's crown &c.; therefore the same William is committed to prison. P. 9 Edw. I. Plac. in Dom. Cap. Westm. asserv. Abbr. 273 a, b. A person who presented himself as procurator for the ordinary, without an authority in writing, was punished by imprisonment. Britton by Wingate, 11.

(d) A man is bound by the act of his attorney-general, as well as by the act of his attorney ad lucrandum vel perdendum in a particular cause, Duke of Norfolk's case, M. 39 Hen. VI. fo. 32, pl. 45.

lar directions, or under a general authority, which is equivalent to a particular direction for every particular suit (*a*); and a suit instituted by the attorney-general is entitled the "king and —," and the jury are sworn "between the king and —," in the same manner as in suits between private individuals.

Whether the king, when there is an attorney or solicitor-general, might by one of his serjeants, or by his solicitor, when there is an attorney, now file either a civil or criminal information, it is not necessary to determine; but the passage cited out of the Harleian Manuscripts (*b*), does not decide in the negative, for the first part, in Henry the Eighth's time, orders the king's solicitor to stop one prosecution and commence another. The office of attorney-general was either vacant or full at that time; if vacant, it proves the solicitor stands in his place; if full, it proves that by particular order, the king's suit is not inseparably attached to the office of the king's attorney. The latter part of the passage, containing the resolution of the 1st and 2d James I., is only the adjustment of a dispute between the attorney-general and the king's serjeant,—whether the king's serjeant could institute a suit so as to privilege it with respect to fees &c. in the ordinary course of proceeding; and it was determined to belong to the attorney-general in opposition to the serjeant's claim; but it does not follow from thence, that the king, if he had pleased, might not have empowered one of his own serjeants to commence it; and a special antecedent direction could not be necessary; for if the king afterwards avows the suit and pursues it, it is a principle and maxim, that "*omnis ratihabitio mandato æquiparatur*;" but there is no occasion in this case to have any recourse to such a ratification; for the solicitor-general is the "*secundarius attornatus*" (*c*); and as the courts take notice judicially of the attorney-general (*d*), when there is one, they take notice of the solicitor-general, as standing in his place, when there is none (*e*).

(*a*) "*Thomas Tykhull, attornatus domini regis in Communi Banco, et in omnibus aliis curiis, quamdiu se bene gesserit.*"—11 H. IV., Rot. Pat. 256 a.

David Holbecke, placitator et attornatus regis in Southwall. et Northwall. in 1 Rich. II. (1377), ib. 197 b. This Holbecke was a Welshman, and was excepted out of the disabling statutes of 2 Hen. IV. c. 12 and 20. 3 Rot. Parl. 590 b, 600 b.

Office of king's attorney in Denbigh, saved to H. Lloyd, 6 Rot. Parl. 351, a.

(*b*) Harl. MSS. i. No. 1226; 19 How. St. Tr. 1102.

(*c*) 28 May, 1644, the Long Parliament made an ordinance "for Mr. Solicitor's doing all acts which ought or may be done by Mr. Attorney-General."

(*d*) 3 Mann. & Ryl. 135.

(*e*) As to the course pursued by the attorney and solicitor-general upon grants of patents for inventions, see *ante*, 150; Smith on Patents, 81, 82, 83, 98.

No. XLVII. (a)

Creation, alteration, &c. of Courts.

Lord Coke says, "In the reign of Henry VIII. the Masters of Requests thought (as they intended) to strengthen their jurisdiction, by commission to hear and determine causes in equity. But their commission, being not warranted by law, (for no court of equity can be raised by commission,) soon vanished, for that it had neither act of parliament nor prescription time out of mind of man to support (b)."

"The king cannot grant by patent a chancery to another; for the common law is the inheritance of every man, and the king cannot prejudice any in his inheritance (c)."

"The king cannot grant that the council of York shall hold plea, by English bill, of an obligation or matters triable at common law, for he cannot alter the law, which is the inheritance of every man (d)."

A writ issued to the escheator of E. to inquire what larceny one John had done to one W. By which it was found that the said John had stolen 20 gallons of wine, taken &c., and another as accessory. And this indictment was sent into Chancery, and afterwards sent into the King's Bench, and the justices would do nothing because the writ was issued against law (e).

Where rape is made felony by statute, it is not inquirable as felony unless before justices who can hear and determine felony; the king cannot make it inquirable in leet by his grant, nor grant the leet to be of other nature than at common law; for the grantee cannot have the court in a different form from that in which it has been *used*. T. 6 Hen. VII. fo. 4, pl. 4. Lord Chief Justice Brooke, adds, "And so see that the king cannot alter a law by his grant, and yet he may grant consuance of pleas, but not to alter the nature of the plea, nor the nature of the Court (f)."

Nathaniel Bacon says. "And whereas Henry the Eighth had gained to himself and his successors, a legislative power by proclamation, the parliament in Edward the Sixth's time took the

(a) *Ante*, 86, 87, 88.

(b) 4 Inst. 97.

(c) *Andrew v. Webb*, 2 Roll. Abridg. 164.(d) *Guy v. Bishop of York*, *ibid.* "The king cannot make a court of Equity by his charter or commission; but he may make courts of Common Law, and the trial shall be by jury."—*Archbishop of York's case*, Jenk. 285, pl. 18.

(e) 42 Ass. fo. 260, pl. 13.

(f) Bro. Abr. *Patents*, pl. 53.

same quite away, and reduced proclamations into their former sober posture. The like may be observed of the power of the parliament in ordering the lives, members, and estates of the people in matters criminal, *and in making and altering courts of justice, and bounding their power*, altering their process, abridging their terms for judicature, reforming errors in pleading, amending common conveyances and assurance, as in passing fines with proclamations—their course in counties palatine—limitations of prescription, fraudulent deeds, recoveries by collusion(a) &c.,—in all which the crown had no power but in and by the parliament. Many particulars more might be added, if the matter so required; for the statutes are more full in these later times than formerly, and may soon lead us beyond a just period in so clear a matter.”—Bacon on Government, cap. 36, p. 165.

*Opinion of Lord Keeper Guilford as to alterations in the courts
by authority of the judges.*

“That if any public order of men, or their employments, were mischievous to the public, it was for the *parliament* to remove them; and even they have always had a regard to the profits of officers, and seldom do any thing to their prejudice. And it is pretended that such interests hinder regulations in parliament. But that need not be so; for the parliament can make them compensation; *but a judge hath no power or reason to alter the state of the offices under his judicature*, but, to reduce them to order, and keep them up to reason and duty, is sufficient.”—North’s Life of Guilford, ii. 84, Roscoe’s edition, i. 433.

No. XLVIII. (a)

Judicial notice to be taken of the Practice of one of the Superior Common Law Courts. M. 2 R. 3, fo. 9, pl. 21; S. C. and S. P. Bro. Abr. Replication, pl. 68.

In a writ of error sued in the King’s Bench, on a judgment given in the Common Pleas, the error assigned was this: After the parties had pleaded to the country, the jury was respited &c. until such a day &c., and there was no entry of any day given to the parties, viz. *idem dies datus est partibus prædictis, &c.* And afterwards this was assigned on the roll for error. The plaintiff in the original plea said and alleged, that

(a) *Ante*, 92.

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the custom in the Common Bench is, and from time whereof &c. was, that upon any continuance after issue joined the jury (is respited) in manner and form aforesaid, and not otherwise, and without any day given to the parties. Et sic in nullo est erratum. And after the whole matter was shewn to the court here, the court was of opinion that there was no necessity for such a replication to the error assigned, because it cannot be tried by the country, or by the certificate of the Court of Common Pleas, but the court here ought, de jure, to take cognizance of such a custom (a), and to decide accordingly; because all Courts of Common law are the king's courts, and each court is bound to know the proceedings in any other court &c. here &c., but not of other courts in cities and counties &c.

No. XLIX. (b)

Necessity of observing usual course in appointing Officers.

1. Appointment during pleasure, where it should be during good behaviour (c).

An appointment of an officer in other manner than the law directs, is void. As where the custos rotulorum nominates A. B. to be clerk of the peace during pleasure, instead of quam diu se bene gesserit, this is no execution of his authority, and the nominee has no title (d).

2. What employment, an office.

Coleman moved for the plaintiff to be restored to fees taken by the defendant, as custos brevium, from the plaintiff, who was his clerk; and, per totam curiam, the clerks bred up in the office, as in the Crown Office, ought of right to succeed each other according to their antienty; so in Prothonotaries place of C. B., and they cannot be turned out without cause, although the chief officer be responsible for their misdemeanors; and any employment out of which one cannot be turned without cause (as this of transcribing records) may be called an office (e). Ordinatur, that he pay back the fees and restore possession accord-

(a) The precedents of each court are sufficient warrant for their proceedings in the same court.—*Jurisdiction of the Court of Common Pleas*, 12 Co. Rep. 109.

(b) *Ante*, 10.

(c) As to the mode of appointing to an office in C. P. *vide post*.

(d) *Rex et Regina v. Owen*, 4 Mod. 293.

(e) As to serjeants having an office, see *ante*, 27, 194, *post* 252.

ing to the last rule, without any allowance unto the custos Appendix.
brevium's son for his transcribing as grantee of his father (a).

3. Grant of Office of Chief Prothonotary to two, void.

Note.—That Sir John Fogge (b) brought a patent into court, and prayed that it might be allowed. And the patent was read; which was, that the king granted to him and his son, the office of chief prothonotary of the Common Bench for the term of their two lives. The justices would not enrol the said patent, because the king cannot grant the said office to two; for the rolls cannot be in the keeping of two men; for if this grant were effectual, he might by the same reason grant it to twenty men, who cannot sit in this Place, *nor have place to sit*. And also it was held by all the justices of the one bench and the other in the Exchequer chamber, that the grant was void. And it was also held by them all at the same time, that if the king made them [*ceux*, query *deux*] chief justice in any of the benches, the patent is void, and, if they occupied by this patent, all that is done before them is error.

No. L. (c)

Petition of Commons that Justices and Serjeants might record (inrol) Attorneys in all Courts. Refused by the King (d).

“Also beseech the commons, that, whereas heretofore none of the king's justices of the one bench or the other, nor the chief baron of the exchequer, had power to record attorneys except in the places in which themselves were justices or judge, except the chief justices of the one bench and of the other, and in many counties of England none of the said justices or chief baron come there, and some who have been or are impleaded or

(a) Winford's case, North's Life of Guilford, Roscoe's ed. i. 389; Humphryes v. Paget, 1 Keble, 689. And see the repealed statute 15 Edw. III. c. 4, Ruffhead, App. 36; M. 39 Hen. VI. fo. 34, pl. 45.

(b) Fogge's case, T. 18 Edw. IV., fo. 7, pl. 6. Fogge appears to have been a zealous Yorkist, and as such knighted and rewarded by Edw. IV. on his accession in 1461, *vide* 5 Rot. Parl. 472 a, 526 b, 583 a; 6 Rot. Parl. 81 b. He was attainted in 1483 as one of a great number of persons, (amongst whom is Thomas Vandyke, late of Cambridge, Nigromancer,) engaged in Buckingham's rebellion against Richard III. 6 Rot. Parl. 245 b, but restored in 1485, upon the accession of Henry VII. Ibid. 273 a; Ibid. 356 a.

(c) *Ante*, 11, 24, 45, 47, 48, 124, 128.

(d) Rot. Parl. 80 a, 3 Hen. V. 1415.

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impleading, were or are decrepit, some so old, some so sick, and detained with such infirmities, some occupied in the service of our sovereign lord the king, or otherwise, about such business, that they for these causes and the like cannot well come to the courts of our said lord the king in their own person, whereby many have been put to great loss, and some disinherited to their great hurt: May it please our said sovereign lord to order, by the assent of the lords spiritual and temporal in this present parliament, that each of the said justices and chief baron aforesaid, and each of the king's serjeants have power to record attorneys in whatsoever place or court of our lord the king, as well in Chancery, King's Bench, Common Bench, and Exchequer, as in other places and courts of our said lord the king; and that all the bills of attorneys (a) by them or any of them taken or recorded in any place or court of our said lord the king heretofore, be of record and have force, as well in pleas determined or pending, as in pleas which shall hereafter be commenced.

Answer.—Let it be as it has been used before in this case."

No. LI. (b)

King's Serjeant, to be sworn to give Counsaill to poure Men without taking eny good(c).—4 Rot. Parl. 201 b, 2 Hen. VI. (1423.)

Amongst certein provisions for the good of the governance of this land, that the lordes, which ben of the K counsaill, desireth.

Item, that the clerke of the counsaill be sworn, that every day that the counsaill sitteth on any billes bitwyx partie and partie, that he shall, as far as he can, aspye which is the poreast suytur's bille, and that first to be read and answered, and the king's serjeant to be sworne trewly and plainly, to yeve the poor man, that for such is accept to the counsaill, assistense and trewe counsaill in his matere so to be suyd, wythout eny good takyng of hym, on peyne of discharge of their OFFICE (d).

(a) Warrants of attorney.

(b) *Ante*, 41.

(c) q. d. money or any other valuable thing.

(d) The office of king's serjeant, not the office of serjeant, as to which latter office, see *ante*, 27, 194, 250.

No. LII.

Aula Regis (a).

The resolution of the authority of the Aula Regia, into the independent jurisdictions now exercised by the Courts of Westminster Hall, appears to have taken place very gradually. In the first stage of the transition, the King's Bench, Common Pleas, and Exchequer have been represented as acting in the nature of committees (*b*), to which the king was in the habit of referring particular branches of the business of his supreme court, or Aula Regia (*c*). That the severance was not complete at the beginning of the fourteenth century, may be seen by the following entries on the rolls of the King's Bench (*coram Rege*), Pasch. 33 Edw. I. (1305), consisting of ninety-eight membranes.

"Membr. 1.—Pleas *before the lord the king* at Westminster, of the term of Easter, in the 33d year of the reign of King Edward, son of King Henry.

22.—Pleas *in the parliament* of the lord the king at Westminster, on Sunday next after the feast of St. Matthias the Apostle, in the 33d year of the reign, &c.

44.—As yet of Quinden. Pasch. Charter of Liberties of the Town of Kyngeston-upon-Hull.

95.—Roll of attorneys.

Mich. 33 & 34 Edw. I. (1305.)

Membr. 1.—Roll of pleas before the lord the king at Westminster, of the term of St. Michael, in the 33d year ending, and the 34th year beginning, of the reign, &c.

26.—Roll of *finis* before the king, of the term of St. Michael, in the 33d year of the now king.

100.—Roll of *finis* before the lord the king, of the term of St. Michael, in the 33d year.

(a) *Ante*, 27, 28, 67, 171.

(b) Palgrave's Commonwealth, 291.

(c) In the Great Roll of 9 Rich. I., rot. 11, tit. London. et Middlesex, is an entry by which Robert Blund, of London, renders account of half a mark, that a concord made between him and Roger de Ginges, in *Curia Regis*, may be written in the Great Roll, respecting land which a former tenant had quit claimed to Roger, the consor, before the king's justices at Westminster, "*coram justiciariis domini regis apud W.*" Madox, Baronia Angl. 229. It does not appear in what reign this fine had been levied. "*Magna Curia*," Bract. 105 b.

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101.—Record delivered (porrectum) before the king, by the hands of William de Bereford and Roger de Heigham, justices of the lord the king, assigned to hear and determine plaints within the liberty of the bishopric of Durham.

104.—Roll of attorneys, of the term of St. Michael, at Westminster, in the 33d year ending of the reign of King Edward.

In Easter Term, 34 Edw. I., and in Hilary and Easter Term, 35 Edw. I., the King's Bench rolls contain similar entries of rolls of fines and of attorneys, and in the latter of these terms (membr. 47), we find a petition sent by the counsel, for Hugh de Curteneye (a).

Going back to the Common Pleas records of T. 1 Edw. I., we find memoranda of moneys paid into the king's receipt (b), and starrs (b), which are matters properly cognizable in the Exchequer (c); and in T. 18 Edw. I., pleas before John de Mettingham and his companions (d), which would be *Common* pleas, inrolled with "Pleas before the king and his council, in his parliament after Easter, between William de Westholl and Matthew del Exchequer," and with a roll "de attornatis et plevinis, coram J. de Mettingham et sociis suis, justiciariis domini regis de Banco apud Westm (e)."

No. LIII. (f)

Authority of Crown in altering form of Commissions, &c.

1. *Commissions of Justices of Oyer and Terminer, and to levy Ships.*

"Commissions are like to the king's writs. Such are to be allowed which have warrant of law, and continual allowance in courts of justice. For all commissions of new invention are against law until they have allowance by act of parliament. Commissions of novel inquiries (g) are declared to be void; commissions to assay weights and measures (being of new invention) are declared to be void, and that such commissions should not be after granted. So as a commission is a delegation

(a) Probably a Petition of Right for the Isle of Wight, as heir to Isabella de Fortibus, who had sold the island in a rather mysterious manner to Edward I. See the inquiry and proceedings, 1 Rot. Parl. 334 a, 336 a. Worsley, I. W. 59.

(b) Membr. 8, 12, 15.

(c) Mad. Exch. c. vii. s. 4.

(d) *Ante*, 45, 119, 169.

(e) Plac. Abb. 172.

(f) *Ante*, 10.

(g) 18 Edw. III. c. 1.

by warrant of an act of parliament (a), or of the common law, whereby jurisdiction, power, or authority is conferred to others, sapientis judicis est cogitare, tantum sibi esse permissum quantum commissum et creditum. And it is a good rule for all commissioners to hold the like, and ever to keep themselves within their commission.

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"The commons do petition, that certain commissions lately sent to cities for the making of certain boats and ballingers, being done without assent of parliament, might be repealed." The king doth answer, "That after conference with the lords, reasonable answer should be made (b)." And that these commissions took no effect, appeareth in this, that no further complaint was thereof made; and no such commission was ever after granted.

At the petition of the Commons, the king (c) granted that one Bennet Willman, who was imprisoned to answer before the Constable and Marshal of England, should be tried according to the common laws of this realm, notwithstanding any commission to the contrary. And thereupon a writ (d) was accordingly directed to the justices of the King's Bench, as there it appeareth. Of these kinds many more authorities might be cited, but let us return to our justices of oyer and terminer.

In the reign of Edw. III. the justices were so careful that no innovation should creep in concerning commissions of oyer and terminer, that certain justices having their authority by writ where they ought to have had it by commission (e), though it were of the form and words that the legal commission ought to be, John Knivett, Chief Justice, by the advice of all the judges, resolved, that the said writ was contra legem. And where divers indictments were before them found against T. S. the same, and all that was done by colour of that writ was damned." (f).

(a) 18 Edw. III. c. 4.

(b) This is not correct. The repeal was immediate. The answer, as it stands in the Parliament Roll, was thus: "A quoy leur feut responduz, que le Roy voet qe mesmes les Commissions soient repelles en toutz points. Mais pur la grande necessite q'y ad des tielx vessels pur defense du roialme en cas qe guerres se preignent, le Roy voet comuner de celle matire ovesq. les seigniors, et puis apres le monstre as ditz communes, pur ent savoir leur conseil et avis celle partie." 3 Rot. Parl. 458 a. A very different course was pursued with respect to ship-money by Charles I. And see *Chambers v. Brumfield*, Cro. Car. 601.

(c) "At the request of the Commons, and by the advice and assent of the Lords in Parliament." 3 Rot. Parl. 530 b.

(d) Set out, *ibid.*

(e) 42 Ass. fo. 260, pl. 12.

(f) 4 Inst. 163.

Appendix.**2. Insufficiency of King's Writ under Great Seal to create Justices of Assise (a).**

In the Exchequer Chamber, all the justices were assembled now again upon the matter aforesaid of the special association of assise; and now, at this day it was demanded by the justices, of the parties, whether they had brought any precedents, and whether such associations have been had before this or not, &c. And the parties said, that they had not made search for any precedents. And the justices said to the parties, we were agreed the last day that precedents should be searched by you; and when we had had view of the precedents, then that we should be advised by them, and upon them; and therefore search for precedents, and if none can be found, then we must do and adjudge as it seems to us by reason. And thus we ourselves then will make our own precedents. But before you have ascertained that there be no precedents, we will not act or pass in this matter, but we will be advised of this matter; for the matter is not light, but doubtful (*n'est legier mes douteux*), and divers questions and doubts thereupon: one, whether special association shall be or not; another, whether the commission of association ought to have been shewn at the assise before the justices, as well as if Thomas Billing (b) had been there; another, *whether this writ which comes to the justices of assise, be a sufficient warrant to them to prove that Thomas Billing was associated to them without shewing any other authority.* So, whether this notice by such a writ was sufficient or not, &c. And the justices said, *although the parties have laboured to the king to have us here together, or otherwise by the desire of Lord Shrewsbury we are assembled here,* still we must adjudge and do according as the law wills, and to that we are bound; and we will willingly deliver the parties, but still it is necessary that we should see precedents, and according to that to be advised; or although no precedents can be found, still it is necessary, for us (c), who shall judge the law, to be well advised, since for a long time, to wit, these 20 years or more, there has been great doubt upon such special association, whether it lies or not. And also other doubts there are in the case before, and therefore we will be advised until next term, for this term is drawing to an end (d).

(a) *Earl of Shrewsbury v. Countess of Shrewsbury and Lord Lisle*, in 1465. Longo Quinto, 137 b.

(b) *Vide post*, 273.

(c) "Vous" is here printed, instead of "nous."

(d) *Est al fine.*

And afterwards, in H. 5 E. IV., all the justices were assembled in the Exchequer Chamber, and there by their advice it seems that Thomas Billing was not associated by the said writ, rehearsing that he was associate, and commanding to them, sc. the justices of assise, to admit him, *for a writ cannot make a justice, but a justice must be made by commission* (a), and otherwise he has no power, nor can he be justice; so the said writ of admission is not sufficient warrant to make him to be associate and justice with them; but e contra, a justice may be discharged (b) by a writ under the great seal, as the said writ of admission is, &c.; and so it seems to the justices in the Exchequer Chamber, that by the said writ there is not sufficient warrant to the justices of assise to prove Thomas Billing to be associate to them, although by special association it might be; for if Thomas Billing had been there, still it was said that it was necessary he should have his patent of association, and that ought to be read in court, and otherwise the justices of assise shall not be bound to admit him, unless he were there with his warrant and his patent and commission of association had been there, but the recital of (c) the writ of admission as before cannot make a justice of assise, sc. to be associate to the said general justices of assise, for such a writ *cannot make a justice*, but it is necessary that a *commission, which is the king's power*, should be made and shewn and apparent to the general justices of assise (d).

No. LIV. (e)

The King's Serjeants called upon to support an Outlawry,—to shew the King's Title in Quare impedit,—to impugn a Pardon,—and to shew the King's title upon a Petition of Right,—upon a Tenure in Capite (f),—and upon a Traverse of Office.

1. To support an Outlawry against Error assigned.

Super quo, scrutatis brevibus de banco hic, justiciariis hic satis constat, quod non sunt nisi tantum 2 brevia de capias

(a) But though a writ cannot supply the place of a commission by letters patent, letters patent may be substituted for a writ, as in the case of peers and knights, *ante*, 178. And see *post*, No. LXVII.

(b) So a serjeant, *ante*, 194.

(c) Quære, "in."

(d) And see F. N. B. 185 E.

(e) *Ante*, 190, 191, 206, 243.

(f) Every tenure is a tenure in chief or in capite, of some one, as the term imports nothing more than *immediate* tenure, whether the tenure be of the king or of a subject. Thus, if A. hold of B. and B. holds of C., A. is tenant in capite to B., and B. is tenant in capite to C.; and, e converso, B. is chief lord (capitalis dominus) of A., and C. is chief lord of B.; but A. is not tenant in capite, but under-tenant (tenant paravaile, par à-val) to C., and C. is not chief

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retornat. versus pref. I. S. et L. W. in pd'o placito; et similiter, per inspectionem rotulorum in banco hic existentium, eisdem justiciariis satis constat de recordo, quod non sunt nisi tantum 2 brevia de capias versus prefat. I. S. et L. W. ante emanationem dicti brevis de exigendo retornata in dicto placito; ob quod quesitum est a *servientibus domini regis ad legem*, et similiter de attornato domini regis, si quid dicere sciant, quare utlagaria pred. adnullari non debeat: qui nihil inde dicunt: Ideo cons. est quod utlagaria predicta evacuetur &c. (a)

2. *King's Serjeants to shew the King's Title in Quare impedit.*

A. B. & C. sum. fuerunt ad respondendum domino regi, de pl'ito quod permittant ipsum presentare idoneam personam ad ecclesiam de M. que vacat, & ad suam spectat donationem, &c. Et modo veniunt tam I. W. qui sequitur pro domino Rege, quam predicti A. & C. propriis personis suis; Et super hoc quesitum est, tam a *servientibus domini regis*, quam a prefato I., qui sequitur, &c. si ipsi informati sunt ad narrandum pro ipso domino rege versus predictos A. & C. de & super jure & titulo quod vel qui eidem domino regi competit in hac parte, ad presentandum ad ecclesiam predictam; qui dicunt, quod non. Super quo facta est hic proclamatio pro domino rege, diversis diebus & vicibus per intervalla, quod si aliquis sit qui informare velit seu sciat, dictos *servientes*, aut dictum attornatum ipsius domini regis, de jure sive titulo quod vel qui eidem regi competit in hac parte ad presentationem ad ecclesiam predictam, veniret & audiretur. Et nullus ex parte ipsius regis ad aliquam informationem in hac parte dandam se optulit, nec predict. I., qui sequitur, &c., aut dicti *servientes ejusdem regis*, de aliquo jure, sive titulo, eidem domino regi in hac parte competenti ad calumniandum & habendum presentationem ad ecclesiam illam, licet ad hoc per Curiam idem I., qui sequitur &c., sepius requisitus fuerit, aut

lord, but lord paramount (par à-mont) to A. So where a party is said to hold in capite of the king, it is immaterial whether the tenure be of the king jure coronæ, or in right of some barony, honor, or manor in the king's hands. It is true that in the latter case, as the party was not tenant in capite until the barony &c. came to the king's hands, the tenant, who is not to be prejudiced by the escheat, or other matter which gave the barony &c. to the crown, holds under the king in the same manner as he did of the baron &c., and not as he would have done if the tenure had been originally an immediate tenancy under the crown,—a circumstance which has induced Lord Coke and others to restrict the term "tenure in capite" to a holding under the crown jure coronæ. But this fanciful limitation of the term would render antient records unintelligible. Madox, Bar. Angl. 163, 181. (a) Rastell's Entries, 302 c.

predicti *servientes*, licet similiter per Curiam sepius requisiti fuerunt, ad presens scit vel sciunt inde aliquialiter informare. Ideo consideratum est quod predicti A. & C. eant inde sine die; salvo jure dicti domini regis, alias si, &c. (a)."

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The next placitum contains a similar entry (b).

3. *Proclamation, upon a Pardon pleaded, inviting every one to inform the King's Serjeants, and to challenge the Jury for the King.*

In trespass by the king, the defendant pleaded, not guilty, and afterwards confessed the action, and pleaded the king's pardon; upon which the judgment is as follows.

Quibus quidem literis patentibus visis, et per curiam hic plenè intellectis, quesitum est de prefato I., qui &c., necnon de *servientibus domini regis ad legem*, per curiam hic, si quid, pro eodem domino rege, dicere sciant, quare predict. I. L. H. et W. B. de premissis, pretextu literarum predict. dimitti et exonerari non debeant; qui dicunt, quod non: Ideo consideratum est quod p'dict. I. L. H. et W. B. eant inde quieti &c. Et juratores impanellati veniunt; super quo p'clamatio hic publica facta est pro domino rege, prout moris est, quod si aliquis sit qui justiciarios domini regis, *servientes ejusdem domini regis ad legem*, seu attornatum ipsius domini regis, aut juratores jurate p'dict., de premissis informare, vel juratores illos, pro domino rege, calumniare vellet, veniret et audiretur; et nullus ad hoc faciendum se optulit; per quod, &c. (c).

4. *King's Serjeants directed to be consulted by the Judges in a Petition of Right in the nature of formedon in the reverter.*

In answer to the petition of Corbet and De la Pomeray in parliament, for the manor of Trematon, &c., it was ordered, "that the justices of the King's Bench having inspected the petition, and having called *the king's serjeants* and others, and examined the record and process, as well in the time of King Edward I., as of the now king, should proceed in the business as of right ought to be done, nevertheless, so that they proceeded not to judgment, Rege inconsulto" (d).

(a) Rast. Ent. 527. (b) And see ib. 114, 192. (c) Ibid., 652, a, b, c.

(d) Coram rege roll of E. 9 Edw. II., produced in *Rowe v. Brenton*, 3 Mann. & Ryl. 460. And see 1 Rot. Parl. 332 b, 345 b, 346 b; 2 Rot. Parl. 438 b. In 6 Edw. I. Guner, the widow of John Wyger, brought a petition of right in parliament, in the nature of a writ of dower, of the manor of Thorner-ton (qu. Thorverton), then in the king's hand *ratione custodiæ*. The answer was, "Videant J. de Kirkeby et Narratores regis rationes si quas rex habet pro se; et nullum habeat dicta defens, (qu. et si nullam habeat,) statim fiat justicia petenti."

Appendix.5. *King's Serjeants consulted by the Treasurer and Barons of the Exchequer respecting a Tenure in Capite.*

It appears by the Memoranda Rolls of the Exchequer, of Michaelmas Term, 11th Edward III., that a question was pending coram rege, whether the lands of Roger Huntingfield, then deceased, were held in capite (a), and by what service; and a writ was thereupon directed to the Treasurer and Barons of the Exchequer, commanding them to inspect the Domesday-book, and to certify the nature of the tenure of the lands in question to the king. The return, after setting out an extract from Domesday at great length, follows in these words:—

“Et super hoc, convocatis ad nos justiciariis Vestris de Banco et *servientibus Vestris ad placita*, ac aliis de consilio Vestro, visisque brevi Vestro et singulis aliis premissis, habitaque inde inter nos matura et diligenti deliberatione, nescimus, super dictis verbis in dicto libro de Domesday contentis, declarationem seu interpretationem facere, nisi quatenus verba inde sonant: consideratis tamen omnibus premissis, non videtur nobis justiciariis, *servientibus*, et aliis de consilio Vestro predicto, quod per ea que sic comperta sunt, est ratio quod Vos, de eo quod ad Vos pertinet in hac parte, juxta prerogativam Vestre regie dignitatis, manum Vestram amovere debeatis, nisi aliud, per partes prosequentes, inde ostendatur, &c. (b)”

6. *Proclamation upon a Traverse taken to an inquisition, requiring information to be given to the King's Serjeants, and tender by Serjeants of such information (c).*

Et continuato inde processu, jurata inde posita fuit in respectu coram domino rege usque &c., ubicunque &c., per defectum juratorum &c. Ad quem diem, coram domino rege apud Westmonasterium veniunt, tam predictus J. H., qui sequitur &c. quam p'd. comes, per attornatum suum pred.; et juratores exacti similiter veniunt; et, super hoc, factâ proclamatione pro domino rege solemniter, prout moris est, si quis pro domino rege justiciariis domini regis, *servientibus ipsius domini regis ad legem (d)*, aut attornato ejusdem domini regis, vel juratoribus, de premissis informare vellet, veniret et audiretur, H. C. et J. B. (e) *servientes domini regis ad legem*, et pred. I., ad hoc faciendum se obtulerunt; super quo processum est ad captionem jurate predictæ.

The jury having returned to the bar to give their verdict, the

(a) *Ante*, 257 (f).

(b) *Mad. Bar. Angl.* 173.

(c) *M.* 16 Hen. VII. rot. 5, inter placita Regis. *Rast.* 268 a, *Enquest.*

(d) These words, “ad legem,” throw light upon the modern form of the proclamation, in which they are omitted.

(e) These names do not occur in *Dugdale*.

Attorney-General pleaded, in arrest of the *verdict* (a), that the jury had eaten and drunk since they went from the bar (b). Notwithstanding this exception the Court received the verdict (which was for the traverser), and then the court examined the keepers of the jury upon their oath. Upon their professing ignorance, the jurors were examined upon their oath, and confessed eating sugar-candy, raisins, dates, &c.; whereupon the jury were committed to the Marshalsea; and as to the verdict, the court were not advised upon giving judgment; therefore a day was given to the parties.

Ad quem diem, coram domino rege apud Westm. veniunt, tam pred. J. H., qui sequitur &c., quam pred. comes A. per attornatum suum pred.; et super hoc, visis, et per curiam hic intellectis et diligenter examinatis, omnibus et singulis premissis, (*servientibus domini regis ad legem, ac ipsius regis attornato, ad hoc convocatis, et presentibus,*) allegationibus et exceptionibus superius, pro domino rege, allegatis et pretensis non obstantibus, consideratum est, quod manus domini regis a possessione &c., amoveatur, et quod idem comes A. ad possessionem &c. Salvo semper jure Regis, si quod &c.

No. LV.

Readers—Utter-barresters—Inner-barresters (c).

In a return made to Henry VIII. by Thomas Denton, Nicholas Bacon (d), and Robert Cary, it is said—

“The whole company and fellowship of learners is divided and sorted into three parts and degrees, that is to say, into Benchers, or, as they call them in some of the houses, Readers, Utter-barresters, and Inner-barresters.

“Benchers or Readers are called, such as before time have openly read; and to them is chiefly committed the government and ordering of the house, as to men meetest, both for their age, discretion, and wisdomes; and of these is one yearly chosen which is called the Treasurer, or, in some house, Pensioner, who

(a) “Non intendit quod curia hic ad captionem alicujus veredicti de jurata predicta super premissis procedere debet.” As to pleading in arrest of judgment, see Hardres, 191.

(b) As to this offence, see Co. Lit. 227 b; Rex v. Woolf, 1 Chitt. R. 401.

(c) And see 4 Reeves, Hist. of Engl. Law, 433; ante, 169.

(d) Afterwards Attorney of the Court of Wards; made Lord Keeper 22 December, 1559.

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receiveth yearly the said pension money, and therewith discharges such charges as abovewritten; and of the receipt and payment of the same is yearly accountable.

"Utter-barresters are such, that for their learning and continuance, are called by the said Readers to plead and argue in the said house doubtful cases and questions, which, among them, are called Motes, at certain times propounded and brought in before the said Benchers or Readers; and are called Utter-barresters, for that they, when they argue the said Motes, sit uttermost on the formes, which they call the Barr (a); and this degree is the chiefest degree for learners in the house, next the Benchers; for of these be chosen and made the Readers of all the inns of chancery; and also of the most ancient of these is one elected yearly to read amongst them, who after his reading is called a Bencher, or Reader.

"All the residue of learners are called Inner-barresters (b), which are the youngest men, that, for lack of learning and continuance, are not able to argue and reason in their Motes; nevertheless whensoever any of the said Motes be brought in before any of the said Benchers, then two of the said Inner-barresters, sitting on the same forme with the Utter-barresters, doe, for their exercises, recite by heart the pleading of the same Mote-case in Lawfrench; which pleading is the declaration at large of the said Mote-case; the one of them taking the part of the plaintiff, and the other the part of the defendant" (c).

(a) This term is also used with reference to the Courts at Westminster.

(b) "Student" and "innerbarrester" are used as synonymous terms in "Orders for the Government of the Inns of Court, established by command of the Queen's Majesty, with the advice of Her Privy Councill and the Justices of Her Bench and the Common Place at Westminster, E. 16 Eliz. 1574." *Cod. Nig. Linc. Inn*, v. 181; *Reg. Hosp. Med. Temp.* 112 a; *Dugd. Orig. Jurid.* 312. And see 3 *Rot. Parl.* 58 a, 593 a.

(c) *Waterhous, Fortescutus Illustratus, or Comment. on Fortescue*, 543, 544. This return describes the mode of study and the course of living at the inns of court with considerable minuteness. It has no date, but as Bacon was Lord Keeper in the reign of Elizabeth, the statement must have been drawn up in the latter part of the reign of Henry VIII.

"John Hill brought action on the case against Gyddy, and recited that he was an utter-barrester learned in the law (erudite in le ley utter-barrester) and practised it, and by his knowledge gained his living." 2 *Anderson*, 41. Therefore, at the time this action was commenced, which appears from *Moore*, 695, to have been in T. 33 Eliz. (1591), Hill had not ceased to be an utter-barrister, though he had become a reader. As Hill was called to be serjeant in November, 1594, and the writ of error was not argued till 1596, this is sometimes called *Serjeant Hill's case*, *Palmer*, 65; 2 *Roll. Rep.* 145.

No. LVI.

Appendix.

Privilege of Serjeants to be sued by Original. Swain v. Girdler, Serjeant at Law, Cook's Rep. of Prac. 104.

Action brought by bill against the defendant, for work done. The defendant pleads in abatement, that he ought to be sued by original, and not by bill. On this a demurrer was joined; and after many arguments and cases cited, the court said, the case of a serjeant and prothonotary's clerk are upon the same foot, neither of them being bound to personal attendance (a) as prothonotaries and attorneys are; so that he ought to have been sued by original; and therefore the court gave judgment for the defendant, that the bill should abate.

No. LVII. (b)

Common Pleadings.

In the City of London there are four common pleaders. Till within a few years all these offices were saleable. Two of them have lately been bought up by the city, and upon one of these becoming vacant, the common council elect a barrister to fill the vacant office. The other two pleaderships pass, as before, by sale and assignment from one holder to another.

No. LVIII.

Question of Precedence between Serjeants and Knights.

To our most Gracious Sovereigne Lord, James, by the Grace of God, of England, Scotland, France, and Ireland, Kinge.
The humble peticon of the Serjeants at Lawe.

Humbly beseecheth your Highness, your supplyants, the Serjeants at Lawe, That where there is some difference and question of precedence and place, betwixt your supplyants in their degree of Serjeants at Lawe, and such knights as have been made since they were called to be Serjeants by Your Highness; and the rather, for that the degree of Knighthood is bestowed upon diverse Utter-Barristers and professors of the Lawe (c). And whereas, Your Supplyants have been Suitors to Your Highness honourable Commissioners for causes determinable in the Earle Marshall's Court, for the determinacon of the same; But, as it seemeth, they are not like to receive any resolucon there by

(a) *Sed vide ante*, 236.

(b) *Ante*, 65.

(c) This appears to be an indirect allusion to the profuse distribution of honours by this prince. *Vide* Speech of James I. from Southwell Papers, *post*, No. LXX.

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reason of the difficultie and consequence thereof, without some direcon from Your Mat^{ie} in beinge pleased to signifie Your Royale opinion what Your Highnesse shall thinke Convenient to bee done in a cause of this nature :

Their humble suit is, That your Highnesse would be Graciouslie pleased, for the avoidinge of further inconveniencies, which are like hereby to the p^judice of Yo^r Mat^{ies} publike service, in all Yo^r Highnes counties of this Realme of England, to consider of the Reasons here within written, and to vouchsafe to deliver Your Mat^{ies} opinion, or to give such order or direction to Your Mat^{ies} said Commissioners therein, as in your princelie Wisedome shall be thought fitt and convenient; and Yo^r Supplyants will hold themselves well satisfied with whatsoever Yo^r Highnes shall determyne therein, and dailie praie for Yo^r Majesties longe and prosperous Raigne over us.

At the Court at Royston, the 20th of October, Anno 1611.

The King's Ma^{tie} beinge well pleased, That the Serieants at Lawe shoulde retayne their Right and auncient reputacon (a), doth appointe some of the peticon^{ers} to attend the saide Lord Commissioners with this peticon, not doubtinge but that their Lordshippes will either determyne this controversie or acquaint His Ma^{tie} with the difficulties; whereupon His Highnes may declare His Royal pleasure therein.

Rog. Wilbraham.

The reasons for such place and precedencie of the Serieants at Lawe, as is required.

Serieants are called by writts, severallie to them directed, under the greate seal of England, by the Kinge, with the advice of his Councell (b), to take upon them such estate and degree. Thus:

"Quia, de avisamento consilij nostri, ordinavimus vos ad statum et gradum servientis ad legem, susceptur., vobis mandamus, firmiter injungentes, quod vos, ad statum et gradum predictum,

(a) By 1 Edw. VI. c. 7, it is enacted, (s. 3.) "that albeit any demandant or plaintiff in any manner of action, bill or suit, shall fortune to be made or created a duke, archbishop, marquess, earl, viscount, baron, bishop, knight, justice of the one bench or of the other, or *serjeant at the law*, depending the same action, bill or suit, yet no writ, action or suit shall, for such cause, in anywise be abatable or abated." And (s. 4.), "that albeit any person or persons being justice of assise, justice of gaol delivery, or justice of peace, within any of the king's dominions, or being in any other of the king's commissions whatsoever, shall fortune to be made or created duke, archbishop, marquess, earl, viscount, baron, bishop, knight, justice of the one bench or of the other, serjeant at law, or sheriff, yet he and they shall remain justice and commissioner; and have full power and authority to execute the same in like manner and form, as he or they might or ought to have done before the same."

(b) *Ante*, Appendix, No. VII.

ordinetis et preparatis," and the writts of dedimus potestatem, whereby serieants take ffynes, are dedimus *vobis* potestatem.

The creacon of Serieants is performed with greate expence and solemnitie; and is alwaies graced with p'sence of the nobilitie, and often of kings, and is the most famous and sumptuous manner of proceedinge in any degree of learninge whatsoever.

Serieants are sparinglie chosen, fewe in number, and those selected after their long studdie, practice, and experience in learninge and competencie of livelihood, are held fitt to take upon them that estate and degree (a).

Serieants at Lawe are as ancient as the Lawe. They have alwaies been imploied in the generall services of the commonwealth, and instead of Places of Justices of Assize (b) and Goale deliverie; and of them are made the Judges, whoe have used, and doe alwaies, call them brothers. They have their scarlett and purple robes, and maie were their coyfes in the King's p'sence (c).

If serieants bee made knights, they doe not preceede or take place of any other serieants, who are not knights, beinge their auncients. And by the death of the late Queen's Mat^e, all the Judges were but Serieants (d), untill againe they were made Judges by the King's L'res Patents.

Place and precedencie is best knowne by usage and custome; but Serieants have been placed in order and rancked next to the Judges, in all coronacons and solemnities, as by some lists and presidents will appeare.

Et consuetudo Regni Angliæ, est lex Angliæ.

Serieants are without controversie above Esquiors, and never written or called Esquiors (e), because that is drowned in the state of a Serieant at Lawe, beinge more worthy; whereof it followes that Serieants being above all that are Knights' inferiors, they

(a) In the Remonstrance by the Commons to Charles I. in 1641, it was made a ground of complaint, that the office of serjeant had been made the subject of sale. 4 Rushworth, 438; 2 Nalson, 694; Rapin, Hist. d'Angl. viii. 143.

(b) Lib. Assis. anno 42, at Exeter; M. 1 H. VI. fo. 3, pl. 10; H. 33 H. VI. fo. 2, pl. 9; M. 3 E. IV. fo. 17, pl. 12; T. 4 E. IV. fo. 1, pl. 1.

(c) "One Mr. Brown had letters-patent, confirmed by act of parliament, to enable him to put on his cap in the presence of the king or his heirs, or any lord, spiritual or temporal, in the land."—Fuller, Church History, Part 2, p. 167; Waterhous, 562. A similar privilege appears to be hereditary in the family of De Courcy, Barons of Kinsale. The head of the Guzmans (the Duke of Médina-Celi), as hereditary "defender of the faith," rides into church with his helmet on.

"Clerici non, nisi in itinere constituti, unquam aut in ecclesiis, aut coram prelatiis suis, aut in conspectu communi hominum, publicè infulas suas (vulgo coyffes vocant), portare, aliquatenus audeant vel præsumant."—Lyndw. Prov. 68.

(d) Vide ante, 212.

(e) Ante, 193, 244, post, 269 (d).

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stand in equalitie with Knights (a), and therefore betweene them and Knights standinge in tearmes of equalitie with knights, there is no other reason of precedencie but senioritie, as it is betweene Knights amonge themselves.

Quere the yssue (b).

No. LIX.

Order of the Prince Regent for establishing the Precedency of the Attorney and Solicitor General.

In the name and on the behalf of His Majesty, George P. R.

Whereas Our Attorney and Solicitor General now have place and audience in our Courts (c) next after the two antientest of Our Serjeants at Law for the time being, and before Our other Serjeants at Law: We, considering the weighty and important affairs in which Our Attorney and Solicitor General are employed, and on which the Attorney and Solicitor General of Us, Our heirs and successors, may hereafter be employed, do hereby order and direct, that at all times hereafter the Attorney and Solicitor General of Us, Our heirs and successors, shall have place and audience as well before the said two antientest of Our Serjeants at Law, as also before every person who now is one of Our Serjeants at Law, or hereafter shall be one of the Serjeants at Law of Us, Our heirs or successors; and We do hereby will and require you, not only to cause this Our direction to be observed in Our Court of Chancery, but also to signify to the judges of *all* (d) Our other Courts at Westminster, that it is Our express pleasure that the same course be observed in all Our said Courts.

Given at Our Court at Carlton House, the 14th day of December, in the 54th year of His Majesty's reign.

By Command of His Royal Highness the Prince Regent, in the name and on behalf of His Majesty.

SIDMOUTH.

To the Right Honourable John
Lord Eldon, Our Chancellor of
Great Britain.

(a) This latter inference appears more worthy of the sovereign to whom the petition is addressed, than of the learned persons by whom the inference was drawn. The argument may be applied thus: "Men being above all that are angels' inferiors, they stand in equality with angels, with no other precedence than seniority."

(b) From an apparently contemporaneous MS.

(c) This would imply *all* courts; but with respect to the *Common Pleas* the recital is incorrect.

(d) As this order was to be notified to all the courts, it would appear that it

No. LX.

Antient Mode of appointing an Attorney.

In an assise of darrein presentment in M. 25 H. III. (1241) the record is abridged (a) as follows :—

The assise comes to recognize what patron in the time of peace presented the last parson, who is dead, to the church of St. John the Baptist, of Gerbodesham, which is void, as it is said, and the advowson of which, Alan de Hekyngham says, belongs to him. And whereupon the said Alan says, that Warin de Murelan and Frechelcenc. de Franchevill have unjustly deforced him of that advowson. And four knights, to wit, Nicholas de Beauf, Peter de Meuling, Thomas de Bavent, and Thomas de Bake- nestorp, being sent to Alan de Hekyngham to hear whom he wished to attorn ad lucrandum &c., come, but did not sufficiently testify that the said Alan had attorned in his place Roger de Cestreton, who makes himself (represents himself as) the attorney of the said Alan. And therefore it is commanded to the sheriff, as it was before commanded, that he send the said four knights, or four others, to Gerbodesham to Alan de Hekyngham, to hear whom the said Alan wishes to attorn in his place ad lucrandum &c. in the same assise, and that he cause them to come before our lord the king wheresoever, &c.

The following entry (b) is of the 28 Hen. III.

Willielmus de Byngham, Thomas de Gonsel, Robert de London, et Adam de Wodeton, iiii milites, missi ad episcopum Sarum, qui languidus est, ad audiendum quem loco suo &c. versus Andream de Cardinan de placito custodiæ, veniunt et dicunt quod posuit loco suo Ricardum de Byngham (c).

No. LXI.

Prayer of Execution in Common Pleas by an Attorney.

An attorney said that his master had recovered a certain debt in the reign of the other king (Edw. II.) against a man who came into court by the bishop and pleaded, and before he had had been represented to the crown, that the order would operate in all courts, including the Court of Common Pleas.

(a) Plac. in Dom. Cap. Westm. asserv. Abbr. 109 b. (b) Ibid. 122 b.

(c) See a plea that the plaintiff's attorney is excommunicated, ib. 108 a. Suitors appear to have been compellable to employ an attorney. 1 Reeves, Hist. Engl. Law, 172. Licet unicuique de regno, amicis suis de jure suo in cur. domini Regis, adjuvare sive consulere. Plac. Abbr. 291.

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execution the king demised the crown (a); and inasmuch as we could not have execution without a new warning, the court gave us a scire facias to the sheriff for the possibility that he might have lay fee; which writ the sheriff has returned nihil habet in ballivâ suâ ubi &c. Wherefore the attorney prayed a writ of execution to the bishop, because he (the defendant) was a parson.

STONOR, J.—If the sheriff has returned that he is a clerk, you shall have it.

The Attorney.—Sir, he came by the bishop, and of part we have execution, and we should have had it of the whole if the king had not demised the crown.

LEE, J. said, in that case he could grant it. Et ita fecit, &c.(b)

No. LXII.

Petition of the Commons, 17 Edw. III. (1343), that Parties to Suits in the Marshalsea (c) may be allowed to plead their own causes in that Court, in order that they may not be delayed for want of Serjeants.—Inability of the Crown to interfere with the vested rights of the officers of a court, by authorizing other persons to exercise the functions of those officers.

Also, inasmuch as many persons who have business in the Marshalsea, are delayed (d) for want of sergeanty (e), whereby they are grievously damaged, Your Commons pray You, if You please, that every one who has business in that Place may be allowed to say his plain truth (f) without being delayed (d) for want of serjeants (g),—and that the execution of the Marshalsea may be done by the sheriff and his ministers, and not by others,—and that they do not encroach (h) pleas or complaints other than it was antiently used in that place,—and that they do not exceed the verge,—and that this be strictly overlooked,—and that the pain ordained in the statute lately made at Westminster (i) be done upon such.

ANSWER.—As to every one being allowed to say his plain

(a) Le roy se demist. Vide Com. Dig. *Abatement*, (H. 38.)

(b) 1 Edw. III. fo. 17, pl. 10. In the old edit. fo. 14.

(c) The old Marshalsea Court, not the Palace Court.

(d) Susduit, *ante*, 180 (b).

(e) Par defaute de sergeantie.

(f) Peusse dire sa grosse verite.

(g) So, in 6 Edw. I. after long pleadings before justices of assise, it is said “predicta Juliana defecit de iudicio suo et seisinâ, quia non habuit *narratorem*.” *Blakgreve v. Belne*, 1 Rot. Parl. 4 a. And see *ante*, 180 (c).

(h) Q'ils ne purpernent.

(i) 5 Edw. III. c. 2, *semble*.

truth (*a*), it pleases the king. And as to execution being done by the sheriff, the king *cannot oust the ministers* of the Marshalsea of their office, which they have in fee. And as to the encroachment (*b*), it pleases the king that a prohibition be made, that no man do against the statute in this case (*c*).

Appendix.

No. LXIII.

Retainer of Counsel by the Year.

Debt on arrears of an annuity, brought by John Bruin, Esquire (*d*), against the Abbot of Chester, upon a demand of 40*l*. And he declares that one R., formerly abbot of the same place, predecessor of this same abbot, by his deed granted to him an annual rent of 40*s.*, issuing out of his monastery aforesaid, pro consilio suo eidem R., nuper abbati, et conventui ejusdem loci, impenso, et in posterum impendendo (*e*): and shews how at the making of the said deed he was, and yet is, a man learned in the law (*f*) of the land, and how he had given to the said R. nuper abbati et conventui, consilium suum apud W. in negociis Domus prædictæ agendis, ad proficuum ejusdem Domus; and afterwards the said R. died, and the said J., the now defendant, was elected and made abbot of the same place; and for so much arrears in the life of the said abbot, he (J. Bruin) had brought his action &c.

Littleton, Serjt., demanded oyer of the deed; et non potuit habere, for that it was after imparlance (*g*). Wherefore he said that the deed bore date at J. in the county of Chester, which is

(*a*) Peusse dire sa grosse verite. (*b*) La purprise.

(*c*) 2 Rot. Parl. 140. "An act of Parliament not in print," 4 Inst. 130.

(*d*) The inferior title of esquire shews that the plaintiff was not a serjeant. *Vide ante*, 265. Formerly this term "esquire" denoted an actual service rather than any rank or station. Abbr. Rot. Orig. 209 b. It was probably assumed upon the passing of the statute of additions, 1 Hen. V. cap. 5, by the higher class of serjeants by tenure (*ante*, 193), and also by those students at law who, under the name of apprentices, were admitted to practise. The service of two esquires countervailed that of one knight. 1 Mad. Exch. 669 (*a*). And see Harl. MSS. 980.

(*e*) "Also as to liveries of cloths, the Commons pray that no lord spiritual or temporal, or any other of less estate, of whatever condition he be, give livery to any except his familiars of his hostel, his kindred and relations (ses parentz et alliez), his steward, *his counsel*, or his bailiff of his manors." To this request an evasive answer was returned by the king (Richard II.) 2 Rot. Parl. 266 a.

(*f*) Home appris de la ley de terre.

(*g*) *Vide* 2 Wms. Saund. 2 n.

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a county palatine, and prayed judgment of the writ brought in Middlesex.

Laicon, Serjt. (a).—The deed was sealed and delivered in the county of Middlesex, where we have brought our action; without this, that it bears date at J. in the county of Chester.

Littleton, Serjt.—Now shew the deed that the Court may try it, for he pleads that plea to the intent that he may have oyer of the deed, quod nota.

Laicon, Serjt., willingly shewed the deed to the court to try the issue, but the trial must be peremptory between us.

Littleton, Serjt.—Certainly not, but only answer.

PARSON, C. J.—If you had pleaded that it appears before us that the deed bears date in Chester, as if the deed had been enrolled in hæc verba &c., then we would have seen the roll, and peradventure it should be but an answer (b); for that it appears before us of record; but in this case you do not plead so, to wit, that it appears before us, but you have alleged matter in fact, to wit, that the deed bears date at Chester, which ought to be tried by the deed, for that the deed is not inrolled in hæc verba, so that he ought to give day to bring the deed, to try that issue; in which case perhaps it will be peremptory. Wherefore advise you well. Wherefore—

Littleton, Serjt. saith, that as to so much arrears being in arrear from such a feast following &c., actio non &c.; for he says, that before the 20th day of September, a tenth was granted by the clergy of (the province of) Canterbury to the king, to wit, on such a day and year &c., and the abbot was assigned by such a one bishop &c. to be a collector of the said tenths; and he shewed to the said J. B., at Chester aforesaid, that the king who now is, had pardoned him all manner of occupations, to wit, to be collector, and many others &c., and shewed a confirmation of the same grant from divers kings, and the said J. nuper abbot prayed him to be of his counsel, and there, at Chester aforesaid, he refused. And he prayed judgment if for any arrears being after the said refusal, action &c.; and as to the arrears being in arrear before &c., he says that he did not give his counsel to the said abbot and convent in manner &c.

MOILE, J.—It seems to me that the count is not good; for he has said and counted that he gave him counsel at Westminster in negotiis domus agendis, and does not shew how he gave him counsel, nor in what things.

(a) William Laken called 1 Feb. 1453-4, to be serjeant 2 July following.

(b) It would have been a sufficient defence without any further answer.

PRISOT, C. J.—That is not needed ; for he is retained with the abbot to give him counsel, and he has said that he has given him counsel in *agendis*, that shall be understood to all things which he wanted, and that is better than to say specially in such a thing and such &c. ; for by that reason he would shew all the causes in which he had given him counsel, and that would be very long to do. Wherefore the count is good enough generally, to wit, that he gave him counsel in *agendis* &c. And if the defendant says that he did not give him counsel &c., then the plaintiff shews in what things and matters he has given him counsel, and to that the defendant shall answer ; but *primâ facie* the count is good generally. *Quod curia concessit*. But it was held by the court that he was bound to say in his count as he has done, to wit, that he has given him counsel, which was to the profit or to the use of the house, or otherwise the counsel will not be good : for the action is not maintainable against the successor upon any contract or writing made by the predecessor, unless its effect come to the profit of the house ; because this grant was merely the deed of the abbot, the predecessor, and not the deed of the convent ; wherefore he ought to shew that the thing wherefore the deed was made, came to the use of the house : as it is of a simple obligation (*a*) contract, and such like acts by the predecessor solely. But if the action had been brought against the same abbot who made the grant, there it would not have been necessary to shew whether he had given him counsel or not ; for if the abbot had not asked of him any counsel, yet he should have his annuity ; but so it is not against the successor, for if he do not give any counsel, he shall not have that action for those arrears against the successor. And such was the opinion of the Court. See the diversity.

Then this question (was raised)—if the predecessor buy certain goods for the use of the house, and that is his intent, and before they come to the use of the house, he dies, so that they do not in fact come to the use of the house, whether that shall charge the successor or not.

Littleton, Serj.—In obligation made by the predecessor, he shall wage his law, for this that he declares, that the thing wherefore the obligation was made, came to the use of the house.

DANBY, J.—The successor cannot wage his law in an action of debt brought upon an obligation made by his predecessor. *Quod*

MOILE, J. *concessit* : for in that case he declares upon the obligation, as the matter is ; and if he wish to declare upon the simple contract against the successor, he shall say that he has an obliga-

(*a*) A single bond or bill obligatory, ut videtur.

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tion of his predecessor for the said duty, and abate his writ. Ad quod non fuit responsum.

Quære, if it be a plea for the successor to say, that he (the plaintiff) has a bond of his predecessor for the duty; for the contrary has been held before : ideo quære.

DANBY, J., held, that the first plea went to the whole, to wit, the refusal, because it was his own act. And the opinion of the Court was against him. As if I grant an annuity to one until he be beneficed, and then I offer to him a reasonable benefice which he refuses, that refusal is his own act, yet he shall have an action of *debt* for the arrears before the refusal; so here : but in a writ of *annuity*, in both cases the refusal is an answer for all, and goes in extinguishment of the whole annuity; for by the refusal the annuity is determined; and therefore the refusal goes to the whole, but not in a writ of *debt* for the arrears; which proves the annuity is expired; and so is the diversity. Quod nota.

Laicon, Serj. As to the first plea, to wit, the refusal, he says, that he did not refuse to give him counsel; ready &c.; and the other the contrary &c. et sic ad patriam. And it ought to be tried by them of the county palatine.

Comberford, Prothonotary, said, that they shall write to the keeper of the palace (a) to try that issue, and when they have tried that issue, all the record will be remanded, and the judgment given in this court; as it is of a voucher in a county palatine, this court shall write to them to try the voucher, or summon the vouchee, and when they have done that, it shall remain in this court, and according thereto they shall proceed here. Quod nota.

And as to the last plea,—that the plaintiff did not give to the said J., abbot, and to the convent, his counsel in manner &c. he said, that to that plea, pleaded in the manner &c.; et sic ad iudicium (b). Quod nota. M. 39 Hen. VI. fo. 21, pl. 31.

No. LXIV.

Retainer of a Man of the Law, by a Master for his Servant (c).

Robert Horn, of London, sued a writ of maintenance against one J. D. and Peter H., surmising therein that they, on, &c., maintained a plea which was depending between the said R. the now plaintiff, and one Francis S., on part of the said F., &c.

(a) County palatine. Mad. Bar. Angl. 151, n.

(b) i. e. the plaintiff demurred. (c) And see M. 39 Hen. VI. fo. 5, pl. 9.

Choke, serjeant (a), for defendants.—Action you ought not to have; because, we say, that before the alleged maintenance, the said F. was retained by the said J. at London, for a certain time; and that afterwards the said R. sued the said writ against the said F.; wherefore the said F. prayed the said J., his master, and the said P., who was cousin of the said J. (and he shews how), for that the said F. could not speak English, to speak to some man learned in the law of England to be of his counsel, and to inform him (the counsel) of his matter. Wherefore the same J. and P., at the time of the maintenance in the same parish, came to one T. Toral (b), a man learned in the law, &c., and prayed him to be of counsel with him, &c.; which is the same maintenance. Judgment, if action, &c.

Billing, serjeant (c), for the plaintiff.—The plea is double; one is, that the said F. was the servant of the said J. at the time, the which is one matter of maintenance; the other is, that the said F. could not speak English, and prayed the said J. to speak to some man learned in the law, and to inform him of his matter; that plea is another matter (d).

Choke, serjeant.—The circumstance that the said F. could not speak English, &c. is not material, and is not another cause of justification; because that is no intermeddling in the case. For if a stranger be aggrieved, and cannot speak (English), in that case it is lawful for any man who can speak his language to be his *Latiner* (e), and to shew the matter to his counsel, &c.

Billing, serjeant.—You see well how that the defendants have pleaded jointly, and the matter which the master has pleaded is no cause for the other to justify: nec e converso.

(a) Richard Choke, called by writ, 1st Feb. 32 Hen. VI. (1453-4), to be serjeant 2d July following. Dugdale, Chron. Jurid. 131; *ante*, 192.

(b) Toral does not appear to have been a serjeant. He was probably an apprentice and attorney (*ante*, 188). His retaining fee was only half a noble, 3s. 4d. (*post*, 276), whereas that of Mr. Serjeant Yaxley (*ante*, 182) amounted to 5*l*. Another person of the name of Toral is mentioned, *ante*, 195.

(c) Thomas Billing, called 1st Feb. 32 H. VI. to be serjeant 2d July following. Dugd. Chron. Jurid. 131. And see *ante*, 256.

(d) Q. d. another distinct defence.

(e) Interpreter. Speaking of Hugo, *latinarius*, mentioned in Domesday, Selden (on Eadmer, 170) says, that *latinarius* signifies the same as “*interpres*,” “*unde latiner eadem notione acceptus*.” It seems probable that “*latinarius*” in Domesday means a translator of ecclesiastical and other documents in the Latin language, and that persons described as “*David, interpres*,” &c. were interpreters between Welsh and English, as *post*, 287, or between the conquered English and the Normans. And see 1 Ellis, Introd. Domesday, 91, 404.

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DANBY, J. (a).—*Reddendo singula singulis*, it is good enough. *Billing*, serjeant.—If he will not amend his plea (b), I will demur.

Littleton, serjeant (c).—Sir, it seems to me that it is no plea; for I conceive that the master cannot maintain for the servant, but the servant may for the master, because he is obliged to do his commands; and yet the servant cannot, of his own authority, pray any man to be with his master, for that is maintenance; but he may say to a man of law, that his master prays him to be of counsel with the master. And peradventure the same holds good on the part of the master; for the master may say to a man learned, &c., that his servant prays him; but if the master pray him of his own authority, it is maintenance; and that is the manner in which he has pleaded here; wherefore, &c.

Choke, serjeant.—It seems to me the contrary, that the master may intermeddle for his servant; for he might have lost his service, and therefore it is expedient that he speak to counsel learned in the law to aid his servant. And, Sir, if a man be a pledge to prosecute for me (d) in a writ, in that case he may intermeddle in the writ on account of what may happen to him; for if I be nonsuit, he will be amerced.

Lakin, serjeant (e); to the same intent.—For otherwise mischief and loss might often ensue to the master. For suppose that I am riding in the country, and my servant who rides with me is arrested; in that case it is lawful for me to intermeddle for him in the plea, and to speak to counsel for him, for my own interest; for his abiding in prison is my loss, and a great delaying of my business, and therefore I may well pay the money of his salary which I owe to him, by his agreement for his deliverance, and for my ease and profit also. For if my servant be arrested with me coming into this court, or to parliament (f), in that case

(a) Robert Danby, made Justice of C. P. 28th June, 1452. Dugd. Chron. Jurid. 131.

(b) *Sil ne voile auerment dire*.

(c) Thomas Littleton, author of the *Tenures*, called 1st Feb. 32 Hen. VI.

(d) i. e. one of the pledges produced by the plaintiff to the sheriff, in compliance with the condition, "*si te fecerit securum*." Until the abolition of pledges to prosecute by the Uniformity of Process Act, the only pledges to prosecute had been for centuries, merely nominal,—John Doe and Richard Roe.

(e) William Laken, or Laicon, called 1st Feb. 32 Hen. VI., to be serjeant 2d July following, Dugd. Chron. Jurid. 131; *ante*, 270.

(f) As to the privilege of Parliament, see Report of Select Committee of House of Commons, 8 May. 1837; *Stockdale v. Hansard*, Printed Papers, 4 June, 1839; S. C. 8 Adol. & Ell. 1—234; 2 Perry & Dav. 1—219.

I shall have a writ of privilege, as well for my servant who is attending me, as for myself, and that is all for my interest and ease; wherefore that matter shews that, although (a) I have the privilege for my servant, it is for my own ease and advantage, and not for the advantage of my servant; wherefore, for my own ease and advantage, I may intermeddle for my servant in writ, bill, or action against him: wherefore, &c.

MOLE, J. (b): to the same intent.—For I well know that the father may intermeddle for the daughters (c), and the daughters (c) for the father, and so every cousin may intermeddle for another, and justify; et a multo fortiori, the master for the servant, and the servant for the master; for I am not bound to find my son in eating and drinking, or in others of his necessities, but at my own will (d); and so it is of every cousin; but the master is bound of very right, to find his servant necessities, or else he does him a wrong; besides, he (e) may have a writ of covenant against him, if he have indentures of covenants. And if a writ of trespass de son clos debruse, be brought against the servant, he shall have aid of his master, if he will pray it. Still the master may well intermeddle. So here. Wherefore, &c.

PRISOT, C. J. (f).—Semble, the contrary. But in your case of the breaking of the close, if issue be taken, and the soil or freehold of the master is in debate, in that case it appears that the master has an interest in the matter. For if I command my servant to enter upon your land, and the entry is lawful, in that case it is proper I should aid him; but if the entry be not lawful, he may know that, and if he enter by my command, in that case he does ill, and the master cannot intermeddle or aid in that case (g). And, Sir, in the case that is put,—that if my servant be arrested when riding with me, I can well maintain and intermeddle for him,—I understand the contrary: unless it were for cause done lawfully and by my commandment, as in the other case I have put; but if he be arrested for his own debt or his own trespass, I cannot intermeddle for him: for it was my folly

(a) Or "inasmuch as," entant que.

(b) Called 14th Feb. 21 Hen. VI. (1443-4), to be serjeant on the Octave of St. John the Baptist (1st July); king's serjeant, Hil. 1454; Justice of C. P. 9th July, 1454. Dugd. Chron. Jur. 127, 131.

(c) "Files" in both editions; probably the word should be "Fitz," sons.

(d) *Vide post*, 276; and see *Urmston v. Newcomen*, 6 Nev. & Mann. 454; 4 Ad. & Ell. 899.

(e) The servant.

(f) Appointed Chief Justice of C. P. 1449. Dugd. Chron. Jurid. 129.

(g) And see *Betts v. Gibbins*, 4 Nev. & Mann. 64; 1 Adol. & Ell. 57.

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to have such a servant. And in the case that is put by Choke,—that if a man be pledge to prosecute for me (a), in such case he may intermeddle for me, it is not so; for no law compelled him to be pledge, but his own will. And if a man be bail for another, to have his body here on the Octave of the Purification, with that case he shall not intermeddle, but because he is required to have the body of that other here, in that case he may come to the bar with the other, and see that his presence be recorded, but not otherwise: but he may not do especial labour to any man learned in the law, nor to any juror to deal favorably with him. And suppose that a man be manucaptor here for another in this court for surety of the peace, and a sci. fa. be awarded against the principal, surmising that he has broken the peace: in that case the manucaptor cannot at all intermeddle, notwithstanding that, if it be found for the king he shall be charged with his sum (b); for it shall be called his folly that he would be his manucaptor. Wherefore, &c. Et nota, that DANBY and ASHTON (c) argued to the same purpose, &c. (ut dicebatur, sed non interfui).

And then Choke.—Sir, we wish to amend our plea for J.; and we say that the said F., being his servant, prayed the said J. to pay 40d. to T. Toral for his labour, parcel of 20s. being then due from the said J. for his salary, and that he did so: the which is the same maintenance, &c.

PRISOT, C. J.—Parolx font ple Wherefore advise you; for that is no manner of cause of maintenance; for it is lawful for any man to bring money to any man of the law, or to another man, by way of message; and so your plea proves nothing more than that the servant sent the money by his master to the said T. Toral, and so may any stranger do, without other intermeddling with the matter, wherefore that amounts to no more than not guilty, &c.

Choke, serjeant.—Then we say that the servant prayed the said J. his master to deliver the 40d., and to pray him to be of counsel with the said servant, wherefore he did so; and prayed judgment.

Billing, serjeant.—Still to that plea, pleaded in manner, &c. (d)

Choke, serjeant.—We will put our plea in certain (e) to-morrow,

(a) *Ante*, 274, n. (d).

(b) The penalty of the recognizance.

(c) *Ante*, 274, n. (a). Nicholas Ayshton appears as a justice of C. P. in 1445. Dugd. Chron. Jurid. 129.

(d) Meaning, "I demur."

(e) In writing, ut videtur.

but we will not change any matter, &c. And so he imparled.
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MOLLE, J., said: That if one who is a general-attorney (a) be in Chancery, and is not at all learned in the law, he may well intermeddle, &c.; but if he will labour a jury, as to offer any of them money for their verdict, that is maintenance. So it is with an attorney, or other who is learned in the law, and is of counsel (b), if he offer money to a jury to give their verdict, or other such thing which is contrary to the law; for in that case a writ of maintenance is maintainable against them; but they may pray the jury on part of their *master* (c) to appear at the day to speak the truth, &c. And they said that the father may give money of his own proper costs for his son or heir apparent, for that he is obliged to find him, &c. (d), and for that he may justify; but not for any other cousin, &c.

Et vide Termino Pasch. H. 9. Kot. ccc. (e), where a writ of maintenance was brought against the Abbot of Buckfast, for that he had maintained a suit inter querentem et quemdam Martinum, maintaining, pro parte Martini, &c.; and the abbot pleaded how that the said Martin was retained to be his barber for a year; wherefore the abbot, at the time of the supposed maintenance, requisivit et rogavit quosdam J. & W., homines in lege terræ eruditos, ad auxiliandum predictum M. essendi de suo; quæ est eadem manutentio; and the parties were at issue, and special maintenance was found against the abbot, &c., and the plaintiff had judgment to recover; and afterwards the abbot brought writ of error, &c. And in the King's Bench the judgment was affirmed, &c. (f) Vide in libro Intrationum Record. maximi voluminis." H. 34 Hen. VI. fo. 25, pl. 3.

(a) *Vide ante*, 246.

(b) *Ante*, 188.

(c) Here the employer of an *apprentice at law*, is called his *master* (the term formerly applied to the employer of an attorney), not his *client*. *Vide ante*, 188.

(d) *Sed vide ante*, 275 (e). So printed in both editions of the Year Books.

(f) The case here referred to is evidently that of *Pomeroy v. The Abbot of Buckfast*. The argument in the Common Pleas is reported M. 21 Hen. VI. fo. 15, pl. 30, where it appears that Martin (Prideaux) was not barber, but gentleman-carver, to the abbot, and that he was not defendant, but plaintiff in the former suit, which was an appeal of mayhem brought by Martin Prideaux against this Pomeroy and others. The persons applied to by the abbot to be of counsel with his gentleman-carver in this appeal, were stated in the abbot's plea to be John Wolstone and J. Wode, "homes erudite en le ley." The plaintiff replied, that the abbot had given 40s. of his own money to one Elliott to labour the jury: upon which new assignment of special maintenance issue was taken. After verdict for the plaintiff, the defendant moved in arrest of judgment, M. 22 Hen. VI. fo. 5, pl. 7. It does not appear that Wolstone or Wode were ever serjeants.

No. LXV. (a)

Degradation of a Serjeant.

In Dugdale's *Chronica Juridicialia*, in anno 1504 (b), we find "Edm. Dudley, *degraded*." In the *Chronica Series*, Dugdale says, "Edmundus Dudley *exoneratus* ab officio(c) servientis ad legem.—Bill. sign. 19 Hen. VII." But in Dugdale's "Warwickshire," vol. i. 420, the transaction is thus stated: "In the 19th of Henry VII. (1504) he (Edmund Dudley) was speaker of the parliament, and should the same year have been serjeant; but, for what reason I will not take upon me to assign, he desired that he might be *discharged from assuming* that degree. Whereupon the king directed his precept (d) to William, Bishop of London, keeper of the great seal, commanding his forbearance of making out any writ to him for that purpose" (e).

In the *Chronica Series*, 1511, we find "Rex concessit (f) Ricardo Brooke, quod ipse ad statum et gradum servientis ad legem suscipiendum, contra voluntatem suam, non assignetur; et quod si electus sit, statim recipere recuset, T. R. 11 Julii, Bill. sign. de anno 2 Hen. VIII."—This seems to be, as in the case of Dudley, merely an exemption from the liability to become a serjeant if he should be presented (g) as a fit person to take the degree.

(a) *Ante*, 36, 37, 194.

(b) Page 147.

(c) As to this being an *office*, see *ante*, 65, 77, 79, 81, 82, 186, 194.

(d) Under the Privy Seal, ut videtur, *ante*, 227.

(e) In 1510, 2 Hen VIII., Dudley was beheaded with Empson for high treason, their chief offence being that they had allowed themselves to be used by Henry VII. (as indeed might be inferred from the indictment, 1 And. 156; Petyt, *Jus Parliamentarium*, 207) as his instruments in extorting money from the people for pardons &c. The financial operations of that king and his ministers appear to have been greatly facilitated by a statute dispensing with the intervention of a grand jury in cases of statutory misdemeanors. "Most of these mischiefs were occasioned by a statute made 11 Henry VII. wherein it was enacted that the justices of assises in their sessions, and the justices of the peace in every county, *upon information for the king*, should have authority to hear and determine all offences and contempts (saving treason, murder or felony) committed by any person against the effect of any statute made and not repealed. Which statute, forasmuch as by force thereof many sinister and crafty feigned and forged informations had been pursued against divers of the king's subjects, to their great damage and wrongful vexation, it was by 1 Henry VIII. repealed.—Rast. Stat. 11 Henry VII. cap. 3, 1 Henry VIII. cap. 6." Petyt, *Jus Parliamentarium*, 208, n. And see *Lords' Journals*, i. 9; Lord Herbert, *Life of Henry VIII.* 5, 6, 12, 13; 2 Inst. 51; Worsley's *Isle of Wight*, 241; Lingard, iv. 8, 9.

Edmund Dudley was father of John, Duke of Northumberland, the father of Ambrose, Earl of Warwick, Lord Guilford Dudley, and Robert, Earl of Leicester.

(f) i. e. under the Great Seal.

(g) *Ante*, 239, 240.

No. LXVI.

Appendix.*Barrister appointed by Letters Patent.*

“ Mr. Finch, of Shrewsbury, was allowed to practise at the barr by letters-patent under the Broad Seale, and never called in any Inns of Court; which was the reason that a traverse was taken to his plea to an information in the Exchequer—*absque hoc quod predictus defendens fuit in lege peritus.*” Star Chamber Book, fo. —. Harl. MSS. No. 980 (a).

No. LXVII.

Violent Assault committed, in 1267, by Robert de Colevill, Serjeant at Law, in Westminster Hall, on the person of Robert de Fulham, Justice of the Jews; and the terms of Compromise.

Memorandum, quod die Mercurii proximo ante festum S. Martini, venit Robertus de Fulham, justiciarius ad custodiam Judæorum assignatus, ad Scaccarium, et ostendit Thesaurario et Baronibus, quod cum iret in Aulâ Regis apud Westmonasterium, pro quibusdam negociis officium suum tangentibus, venit quidam Robertus de Colevill, *narrator de banco*, et manus injecit in ipsum violentas, ipsum per pectus trahendo; et peciit emendas sibi fieri, eo quod ipse, et socii sui justiciarii, sunt de gremio Scaccarii (b). Propter quod prædicti Thesaurarius et Barones venire fecerunt coram eis prædictum Robertum de Colevill; qui tandem, ad instantiam *sociorum suorum narratorum*, concordatus est cum præfato Roberto de Fulham in formâ subscriptâ, videlicet, quod idem Robertus de Colevill venit coram dictis Thesaurario et Baronibus, et coram Gilberto de Preston (c) et Rogero de Messinden (a), justiciariis de banco, tunc sedentibus in ipso Scaccario, in tunicâ discinctus, capite discooperto, et supposuit se voluntati prædicti Roberti de Fulham, tam de vitâ et membris, quam de terris, tenementis et omnibus bonis et catallis suis: et idem Robertus remisit ei prædictam transgressionem, et admisit eum ad osculum, in formâ prædictâ. Et concordati sunt. Ex Mem. 52 Hen. III. rot. 3 b (d).

(a) No date is assigned to this transaction. The star-chamber was abolished by a bill which received the royal assent 5th July, 1641.

(b) As to the relation in which these justices stood to the barons of the Exchequer, see Mem. in Scacc. Maynard, 3, 8, 9.

(c) Justice of C. P. 1267. Dugd. Chron. Jurid. 69.

(d) Madox, Exch. c. vii. s. 3 (k).

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No. LXVIII. (a)

Record in an Action of Conspiracy against a Serjeant at Law, who was Countor, and frequently Assessor in the Court of Oxford, the Bailiff of Oxford, a Juryman, and another.

Coram Rege Trin. 25 Edw. I. (1297), rot. 22.

- Oxon. Mia. Thomas le Mareschal de Oxon., Henricus Gamage, Thomas de Hengseye (b), et Willielmus de Colesburn, in misericordia pro pluribus defaltis &c.
- Declaration. Idem Thomas et alii attachiati fuerunt ad respondendum Thome filio Thome de Oxon. de placito conspiracy et transgressionis, secundum ordinationem Regis, &c. Et unde queritur, quod cum ipse fuisset seisitus de uno messuagio in Oxon. predictus Thomas le Mareschal, qui est *narrator in curia Oxon.* et frequenter *assidens* in banco cum ballivis ejusdem ville ad judicia facienda (c), maliciose procuravit et abettavit quendam Johannem, filium Ricardi de Dadington (d), ferre breve nove disseisine versus predictum Thomam filium Thome, de predicto messuagio, coram Henrico de Evefeld et Johanne de Bosco, justiciariis ad assisas in comitatu predicto capiendas assignatis &c., procuravit predictos Henricum Gamage, Thomam de Hengseye, tunc ballivum, et Willielmum de Colesburn, ad placitum prefate assise manutenendum et juratores ejusdem procurandos; et cum
- Maintenance. predicto Johanne filio Ricardi pepigit (e) quod quam cito contingeret ipsum Johannem messuagium predictum recuperare, quod
- Embracery. illud daret predicto Thome le Mareschal pro decem solidis, ita
- Champerty. quod predicti Henricus, Thomas de Hengseye et Willielmus, per conspiracy et confederationem, per procuracionem et abettum predicti Thome le Mareschal inter se maliciose factas, inter se affirmaverunt quod quemcunque eorum in assisa predicta esse contigerit, quod ille assisam illam transire faceret pro predicto Johanne; unde, per eorum conspiracy et procuracionem predicta assisa arraniata fuit et capta apud Oxon. die Lune prox. post festum exaltationis Sancte Crucis, anno regni regis nunc
- Overt acts of conspiracy. (a) Shortly stated, *ante*, 170, 255. (b) Hinksey.
- Bailiffs of Oxford. (c) Here the serjeant at law is represented as an assessor to (*assidens in banco cum*) the bailiffs of Oxford in the administration of justice (*ad judicia facienda*). The functions of the bailiffs of the city of Oxford, which had long ceased to be of a judicial nature, were, by 5 & 6 Will. IV. c. 76, transferred to one officer to be called the *sheriff* of the city of Oxford. The reason of this change of title is not apparent, as this nominal sheriff exercises the same functions as were exercised by the former bailiffs of the city, and is not authorized to perform any of the duties of a sheriff.
- (d) Deddington in Oxfordshire. (e) q. d. pactus est.

xxiii^{to} (a), cujus assise predictus Henricus fuit unus recognitorum, et tunc procuravit alios recognitores, qui dixerunt quod predictus Johannes disseisitus fuit. Per quod, messuagium illud recuperavit &c., et illud incontinenti dedit predicto Thome le Mareschal juxta formam confederationis predictae; Unde dicit quod deterioratus est, et dampnum habet ad valenciam xl. librarum. Et inde producit sectam &c.

Appendix.

Et predicti Thomas le Mareschal et alij veniunt et defendunt vim et injuriam et omnem conspirationem quando &c. Et predictus Henricus dicit quod bene verum est quod ipse fuit unus recognitorum prefate assise, et quod ipse, simul cum alijs recognitoribus ejusdem assise, dixit inde veredictum suum, sicut de communi consilio et assensu ipsorum omnium inter eos provisum fuit; unde predictus Thomas filius Thome tulit versus eum et alios recognitores breve de juratoribus xxiii^{to} (b), ad convincendum ipsos xii &c. Et petit judicium, si, pendente placito predicto, jurata debeat hic ad conspirationem istam respondere &c. Et predictus Thomas non potest hoc dedicere; ideo predictus Henricus, inde sine die. Et predictus Thomas filius Thome in misericordia pro falso clamore &c. Et predictus Thomas le Mareschal dicit quod ipse est *communis serviens narrator* coram justiciariis (c) et alibi, ubi melius ad hoc conduci poterit, et quod ipse, in placito prefate assise, coram prefatis justiciariis stetit cum predicto Johanne, et de consilio suo fuit, tanquam serviens suus, et sicut talibus servientibus in hujusmodi casibus bene licet. Et quod ullam conspirationem, transgressionem, confederationem, seu aliam prevaricationem maliciose fecit, ponit se super patriam &c. Et predictus Thomas de Hengeseye dicit quod tempore quo assisa predicta capta fuit, ipse fuit ballivus domini regis; et quod ipse, tanquam ballivus, fecit officium suum in hiis que officium suum tangebant de eadem assisa, sicut et in aliis que ei precipiebant ratione ballive sue, sicut ei bene licuit, absque aliqua conspiratione, prevaricatione seu maliciosa confederatione inde facienda. Et de hoc ponit se super patriam &c. Et predictus Willielmus de Colesburn dicit quod ipse in nullo est culpabilis de conspiratione et transgressionem predictis; et de hoc ponit se super patriam. Et predictus Thomas filius Thome similiter. Ideo veniat inde jurata coram rege in Octabis Sancti Michaelis ubicumque &c.; quia tam &c.

Plea by jurymen, an attaint pending.

Plea by serjeant, that he is a common serjeant-countor, and that he was of counsel with former plaintiff.

Plea by bailiff, that he acted as the king's bailiff.

Plea by fourth, not guilty.

(a) On Monday next after 14 Sept. 1296.

(b) Afterwards called a writ of attaint,—abolished by 6 Geo. IV. c. 50.

(c) This would be in the Common Pleas, supposing the separation of the courts to have been at this time complete.

No. LXIX.

Inrolment of a Writ constituting a Justice in C. P.

De Radulpho de Neu- } Rex constituit Radulphum de Neu-
vico (a) constituto Jus- } vico Justiciarium Regis de Banco, et
ticiario in Banco. } eum aliis Justiciariis de Banco socium
exhibuit: Et mandatum est Justiciariis de Banco, quod ipsum
ad hoc socium admittant. Teste Rege apud Portesmue 29 die
Aprilis.—*Rot. Claus. 14 Hen. III. m. 8.*

De Justiciario } Rex Justiciariis suis de banco, salutem: Sci-
in Banco. } atis quod associamus vobis dilectum et fidelem
nostrum Robertum de Ros (b), residentem vobiscum in banco
nostro London (not Westminster), ad assistendum vobis in hiis
que ad bancum predictum pertinent: Et ideo vobis mandamus
quod ipsum Robertum ad hoc factum admittatis, recepto sacra-
mento ab eodem quod in negotiis et agend' et fideliter intendat'.
Teste Rege apud Kingeston.

Eodem modo mandatum est Justiciariis de Regin. de Moyun
et R. de Bello Campo (c).

Eodem modo prius mandatum fuit Roberto de Lexinton (d) et
W. de Elor (d) et aliis, Justiciariis in Banco, de Roberto de Ro-
kele (e).—*Rot. Claus. 18 Hen. III.*

Pro Placitis tenendis } Rex dilectis et fidelibus suis Johanni
in Banco. } de Metingham (f), Roberto de Hert-
ford, Elie de Bekingham, Willielmo de Giselham, et Magistro
Roberto de Thorp, salutem: Sciatis quod constituimus vos Jus-
ticiarios nostros ad placita in Banco nostro tenenda secundum
legem et consuetudinem regni nostri, quamdiu nobis placuerit,
&c.—*Pat. 18 Edw. I. m. 43.* "In Banco" simply Cal. Rot. Pat.
54 a.

Rex dilecto et fidei suo Petro Mulore, salutem: Sciatis quod,
loco dilecti et fidelis nostri Willelmi de Hereford, quem nuper
associavimus Johanni de Metingham et sociis suis, Justiciariis
nostris de Banco ad communia placita ibidem, &c.—*Pat. 20
Edw. I.*

(a) Probably Ralph de Novavilla (Neville, or Neville) Bishop of Chi-
chester. Dugd. Chron. Jurid. 55, 59.

(b) Made a justice of C. P. 17 H. III. 1233. Dugd. Chron. Jur. 57.

(c) Robert de Belchamp, justice of C. P. 17 H. III. 1233. Ibid.

(d) Ibid.

(e) Justice of C. P. 17 H. III. 1233.

(f) *Vide ante*, 45; Bracton, 26 a.

No. LXX.

Tenure by Serjeanty (a).

Littleton says (b), "Tenure by grand serjeanty (c), is where a

(a) A fine was levied in fifteen days of Easter, 6 Johā in Cuf dñi Reġ aſd Vet' Tēplum, coram ipso domino Rege, G. fī Pet', Simoſi de Paſhillis, Eustaċ de Faucūbere, Maġro Raċ. de Stoċ, Jacobo de Poſne, Godeff de Inſuſ, Johe de Gertlinġ, Oſſto fī H'vei, Walſ de Crepinġ, juſtiċ et aliis baronibus dñi Reġ tūc ibi pſentibus, between Gilbert de Mepterhall, demandant, and Almeric de Landes, tenant of five hides (as to which term see Appendix to Worsley's Isle of Wight) of land, with the appurtenances, in Felmeresham, Bedfordshire, whereof thirteen yardlands (virgatæ) of land were de *serjancia* domini Regis, and seven yardlands were of the fee of Earl David.—Hunter, *Fines et Pedes Finium*, 60. In the same year, in five weeks of St. Michael, another fine was levied in the king's court at St. Bridget, London, before the justices and barons between the same demandant and Richard de Piencurt and Egelina his mother, tenants. *Ib.* 63. In both fines it appears that thirteen yardlands "of serjeanty" were held at a money-rent for all service except foreign service (being probably a portion of an arrented serjeanty, *post*, 285), whilst the seven yardlands which constituted the remainder of the five hides, were held of Earl David by the fourth part of a knight's service, *pro omni servitio*. The "service of *one serjeanty*" frequently occurs. *Mad. Bar. Angl.* 215, 222, 224, 225.

(b) *Litt. s.* 150.

(c) Called by Madox, "Grand and Chivalerian Sergeantie" (*Mad. Bar. Ang.* 31), to distinguish it from *Parva Serjantia*, which was commonly a socage tenure (*Litt. s.* 159). We find however (*Mad. Bar. Ang.* 222), that in Wiltshire Sir William de Hardon held by the service *unius parvæ serjantiæ*, which, at the General Proffer of Knights' Services to the king, taken at Twedemuth, 10 Sept. 4 Edward II., before Sir Bartholomew de Badlesmere, constable of England, and Sir Nicolas de Segrave, marshal of the king's host, he offered to perform per Johannem Brokepenny cum uno equo *discooperto*, and that from the same county Richard Dansi optulit *servitium unius parvæ serjantiæ, faciendum per Ricardum de Opton cum uno equo discooperto*. And see *post*, 285.

It is observable that at this general muster all those who held by knights' service appeared with covered (armed) horses, whilst those who held either per *serjantiam* or per *parvam serjantiam* appeared with uncovered horses, except Sir Hugh de Blount, of whom it is recorded that *recognoscit et offert servitium suum unius feodi serjantiæ, faciendum per Hugonem le Blount et Henricum le Blount, filios ejusdem Hugonis, cum uno equo cooperto et uno equo discooperto*.

As the name of King Edward occurs in the record without addition, Mr. Madox has supposed that this muster took place under Edward I., but there was no armament on the Scottish border in the early part of the reign of Edward I. and mention is made of his son's favourite, Petrus de Gavaston, as *Comes Cornubiæ* which earldom was conferred on him in 1 Edw. II.

It appears by this record that the Earl of Angos tendered the service of two knights' fees and a *half*, to be performed per Johannem de Vaus et Gilbertum de Bourdon, milites, et Robertum de Reymes, *servientem* (*Mad. Bar. Angl.* 223). Here the serjeant at arms' services are estimated at half of those of a knight, the proportion observed (1 *Mad. Exch.* 669) between knights and *esquires*.

Appendix.

Littleton.

man holds his lands (a) or tenements of our sovereign lord the king, by such services as he is bound to do in his proper person to the king (b),—as to carry the banner of the king, or his lance, or to lead his army, or to be his marshal, or to carry his sword before him at his coronation, or to be his sewer at his coronation, or his carver, or his butler, or to be one of his chamberlains of the receipt of his exchequer, or to do other like services, &c. And the cause why this service is called grand serjeanty is, for that it is greater and more worthy service than the tenure of escuage. For he who holdeth by escuage, is not limited by his tenure to do any more especial service than any other who holdeth by escuage is bound to do; but he that holdeth by grand serjeanty is bound to do some special service to the king, which he that holds by escuage is not bound to do."

Coke.

Lord Coke says, "Serjeanty cometh from the French word (serjeant) *satelles*, and *serjeantia idem est* (c) *quod servitium*. And it is called *magna serjeantia*, or *serjanteria* (d), or *magnum servitium*, *great service*, as well in respect of the excellency and greatness of the person to whom it is to be done (for it is to be done to the king only), as of the honour of the service itself." And so Littleton himself in this section saith, that it is called *magna serjeantia*, or *magnum servitium*, because it is greater

(a) As to the capitale messuagium, or caput serjeantiæ, see Madox, Baron. Angl. 22. And see *post*, 288.

(b) Lands in Kent were held by the service "tenendi caput Regis in navi inter Dovorriam et Whitsand, cum pertransierit mare ibidem." Adjudged to be grand serjeanty, H. Fines, 20 Hen. VI. Mad. Bar. Angl. 245 (d).

Serjeantia, and servitium.

(c) It would appear to be more correct to say that serjeantia is a *species* of servitium. Every serjeantia is servitium, but every servitium is not serjeantia. "Walterus de Mahurdin reddit compotum de viginti solidis, ut fiat inquisitio utrum teneat terram suam per serjenteriam vel per servitium militis." 6 Johann. 1 Mad. Exch. 4to ed. 439 (k). This may be one of the serjeanties mentioned, *post*, 288.

"Serjantiæ servitium mutatum, viz. servitium serjantiæ in servitium militare." Mich. Recorda in Scacc. 36 Edw. I. (1306.) Jones, I. E. R. Memoranda, tit. *Servitium*. "Quia non fecit servitium (for his serjeanty) ideo mutatur in aliud servitium.—Rot. Serjantiarum penes Remem. Scacc. Thes. rot. 16. Glouc." Madox, Baron. Angl. 32 (t). In almost every page of Testa de Nevill we find a list of "serjantie mutata in servitium militare."

Adam de la More [debet] dimidiam marcam, ut scribatur in Magno Rotulo, quod G. filius Petri testatus est per breve suum, quod est in forulo Marescalli, quod Rex vult, quod ipse Adam teneat terram suam de Horton cum pertinentiis, quam Rex Ricardus ei dedit pro servitio suo, per servitium Falconariæ; et quod prædictus G. filius Petri præcepit per idem breve, inrotulari, quod ipse Adam teneat per prædictum servitium.—Mag. Rot. 1 Joh. Rot. 16 b, Oxenefordscire; Mad. Baron. Angl. 32 (s); *post*, 288.

(e) Glanv. lib. 9, c. 4; Fleta, lib. 1, c. 10, lib. 2, c. 9; Britton, c. lxxi.

and more worthy than knights' service, for this is *revera servitium regale*, and not *militare* only; *Fleta* saith, *magna autem serjeantia dici poterit, cum quis ad eundem cum rege in exercitu cum equo co-operto vel hujusmodi, ad patriæ tuitionem, fuerit feoffatus (a).*"

Appendix.
Fleta.

Formerly a large portion of the kingdom was held by the special services, called serjeanties or serjeantries, (*serjantiæ sive serjenterie*). The process by which they were very much reduced in number before their abolition (*b*) during the Commonwealth, appears to be as follows. Land held by the special service of serjeanty were neither alienable nor partible (*c*). But a practice had prevailed, which was recognized by the statute *De prerogativa regis*, 17 Edw. II., cap. 7 (*d*), for the king's tenants holding by serjeanty to dismember their estates, and a commission issued from time to time to apportion the burthens of the tenure amongst the new and old tenants. It was, however, generally found most convenient to fix a money value upon the whole service, and then to apportion the sum *pro ratâ* amongst the alienor and alienees. This process was called arrenting the serjeanty (*arrentatio serjentiæ*); and from the records of these arrentations we incidentally become acquainted with the nature of the different serjeanties which were thus successively extinguished (*e*). Sometimes the alienor was subjected to a continuance of the special service in addition to money payments assessed on the alienees (*f*); sometimes the alienees were adjudged to pay a money rent, and the serjeanty of the alienor was commuted for knight's service.

Arrentation of
serjeanties.

Serjeanty is divided by Bracton into two classes; first, that which consists of direct military services, which can only be reserved by the king; and, secondly, that which consists of civil services, such as holding the lord's courts, riding with the lord (*g*) or lady (*g*), carrying the lord's writs within certain districts, keeping harriers and other dogs, mewing birds, i. e. hawks, or of services relating to war, but not requiring the personal attendance of the serjeant or his deputy, as finding bows and arrows or a sumpter-horse, &c. Serjeanties of the second class

Bracton.

(a) Co. Litt. 105 b.

(b) Confirmed by 12 Car. II. c. 24.

(c) Plac. in Dom. Cap. Westm. Abbr. 39 b. And see *post*, 297.

(d) "*De serjantiis alienatis sine licentiâ Regis consuevit Rex arrentare, hujusmodi serjantias per rationabilem extentam* (as to the duty of extensors, *vide* Plac. Abb. 312 a) *inde faciendam.*" And see 1 Edw. III. c. 12; Rot. Parl. ii. 10 a, 12 a, No. 27, 272 a, 304 b, 342 a, 354 a, iii. 306 a.

(e) *Testa de Nevill*, *passim*.

(f) Who were in general subinfeoffees.

(g) Serjeants holding manors, or lands, by the service of riding with their lords, &c. were called Rodknights.—Bracton, 35.

- Appendix. might be reserved by the king, or (before the statute of Quia emp-
tores, passed in 1290) by a subject. This latter species of serjeanty
is the petty serjeanty of Littleton and Coke, but Bracton appears
to have known no distinction between magna and parva serjeantia,
except one derived from the *value* of the service reserved (a).
- Testa de Nevill. The work called Testa de Nevill consists of inquiries into
tenures throughout England, made for different purposes, chiefly
in the reign of Henry III., though it contains a few entries which
belong to the early part of the reign of Edward I. and some
which purport to be made in the reign of John. The bulk of
the volume appears to have been compiled in 19 Hen. III. on
occasion of the aid levied by that king upon the marriage of
his sister Isabella to the emperor Frederic II. (b). The accuracy
of Bracton upon the subject of tenure by serjeanty is confirmed,
in a remarkable degree, by the returns preserved in Testa de Nevill.
- Amongst the serjeanties recorded in this work, the following
may be taken as a specimen of the general character of the whole.
- Land in Nottinghamshire and Derbyshire was held by the
service of furnishing the king upon his coming to Nottingham,
once in the year, with twelve arrows for the serjeanty of Cole-
wick, and for the serjeanty of Wyleweby by the service of one
horse of the value of 13s. 4d., and a sack, cum brochiâ (c), and
a hempen halter of the value of one halfpenny (d). Sumerhale,
in Northamptonshire, held in serjeanty, by the service of finding
the king, in his army in Wales, one horse of the price of 5s. with
a halter of the price of 1d. to carry sumagia (e) for forty days (f).
The manor of Whitfeld, by the serjeanty affectandi (g) unum
bracketum to the use of the king, at the king's command, to run
at a stag and hind, buck and doe (f). A forester in fee in the
forest of Clive, held land in Jarewell by the serjeanty of that forest-
ry (h), and further rendering 3s. rent (f). In Sibethorpe, in North-
- (a) Bracton, 35, 87, 88; Baile de Script. Britt. Cent. 3, c. 98.
- (b) She was his third wife. The marriage was celebrated at Worms with
unusual splendour. *Vide* Schmidt, Geschichte der Teutschen, iii. 28. Schmidt
calls her "des Königs Heinrichs Tochter." Henry was then 28 only.
- (c) According to Spelman, explaining a similar tenure in Bracton, lib. 2,
tit. i. c. 6, brochia would be a vessel for the conveyance of liquids. But see
post, 289.
- (d) Testa de Nevill, 16 a.
- (e) Sumagium was the load borne by a sumpter-horse (sumerius).
- (f) Forestarius capiat,—pro equo qui portat sumagium (Bête de somme), per
dimidium annum, obolum, et per alium dimidium annum, obolum."—Charta
Forestæ, c. xiv. *Vide* M 11 Hen. IV. fo. 28, pl. 53; Hunter's *Fines*, 333.
- (g) Archiepiscopus excommunicavit F. Broc, eo quod amputaverat caudam
sumerii sui."—Hoveden, anno 1171. And see Lib. Quot. Gard. 77, 143, 170,
181.
- (h) Testa de Nevill, 28 a.; and see 2 And. 20.
- (g) Qu. Breaking in. (h) And see T. de Nevill, 156 a; *post*, 292.
- Arrows.
- Horse with sack,
halter and goad.
- Sumpter-horse.
- Bracket.
- Forestry.
- Marriage of
Isabella.
- Sumpter-horse
at 1d. per
annum.
- Excommuni-
cation for
cutting off
archbishop's
horse's tail.

amptonshire, Nicholas le Archer held a serjeanty, for which he was to find the king in his army a man with his bow and arrows within England, at his own cost, for forty days. In Shropshire, half a hide of land in Hentor was held, by the serjeanty of finding one serjeant-footman (a) at the castle of Shrewithin for fifteen days at his own cost, if necessary (b). The manor of Esseleg, in Staffordshire, by the serjeanty of finding a serjeant-horseman, at his own cost, at the castle of Srawith'm (c). It is also said that John de Estleg holds Estleg, antiquitùs ex conquestu, by the service of finding one serjeant-horseman with a haubergellum, to go with the king when he goes with an army in Wales (d). Another serjeanty in Staffordshire, by the service of finding a serjeant with a lance (e). Another, by that of finding a serjeant-footman to conduct Welshmen from Powis at the king's cost (e). Another, by that of being constable of footmen in the king's army in Wales, at the king's cost, at 12d. per day (e). Another by the serjeanty of carrying, twice a year, the farm of the county of Salop to the Exchequer, at the king's cost (e). Lands in Wittinton (Salop), by the service of being *latinarius* (f) between Welshmen and Englishmen (g). Other lands there by the serjeanty of being the king's constable of 200 footmen in his army in Wales, so long as the king should be there (h). Land in Sutton, by the serjeanty of finding the king a horse with a halter to draw the king's treasure every year, at the feast of St. Michael, from Shrewsbury to London (h). Land in Stockton, Shropshire, by the serjeanty of finding one serjeant-footman with bows and arrows in defence of the castle of Srewardin, (which service was afterwards attorned (i) to the castle of Montgomery,) at his own cost, for fifteen days in the time of war (j). Land at Brocton, by the service of being at [the castle of] Montgomery (k) in defence, with whatever arms the serjeant chose to defend himself with (l). Land in Stanford, in Herefordshire, by the serjeanty of drawing the king's treasure to London at the king's cost; and of summoning barons to the army (m). This service is afterwards stated to be, to draw the king's treasure from Hereford to London, at the king's expense, and to return at his own expense, and to summon the bishop at

Archer.

Serjeant-footman.

Serjeant-horseman in garrison.

Serjeant-horseman in army.

Serjeant-footman to conduct Welshmen.

Carrying the revenue.

Latinarius.

Constable of footmen.

Horse to draw revenue. Archer in garrison.

Serjeant in garrison.

Drawing revenue, and summoning barons and bishop.

(a) *Servientem peditem.*(b) *Testa de Nevill, 53.*(c) *Ib. 58 b.*(d) *Ib. 55 b.*(e) *Ib.*(f) *Ante, 273.*(g) *Testa de Nevill, 56 a., 417 b.*(h) *Ib. 58 a.*(i) *A similar attornment, ib. 134 b.*(j) *Ib. 59 a.*

(k) "The constables, knights and serjeants who were in castles, as well those belonging to the king as those belonging to the barons, did use in former times to exercise a great influence over the towns which were near them." *Madox, Bar. Angl. 19.*

(l) *Testa de Nevill, 60.*(m) *Ib. 67 a.*

<u>Appendix.</u>	<p>Brumhard, and to come with the bishop to certify his summons (a). Land in Mawerdin, by the serjeanty of measuring the king's ditches and works at the king's cost ; other land was held there by the serjeanty of keeping the gate of the castle of Hereford, receiving one penny a day from the king's purse (b). Lands at Mawrthyn, by the serjeanty of summoning the lords of Wygmor at Wygmor, and of Brous at Kingslane, and the lords of Lacy and Wilberley, and of distraining them for the king's debts, when necessary, and of drawing the king's treasure from the castle of Hereford to London, and to have twelve pence per diem ; and because that service is weak (<i>quia servitium predictum debile est</i>) therefore it is changed, with the consent of the tenant, so that the tenant render to the king twelve pence per year, and do the service for the fortieth part of a knight's fee (c). Land in Herefordshire, by the serjeanty of summoning the Bishop of Hereford before justices (d) ; other land by that of measuring the castle of Hereford, and of keeping (<i>custodiendi</i>) the workmen there (d). Land in Gloucestershire, by the serjeanty of keeping the king's enemies (e). The manor of Septon in Gloucestershire was the <i>caput serjeantie</i> (f) of William le Mayne in Maddington, in the county of Wilts, for which serjeanty he was to be the <i>emptor coquine</i> of the king (g). A serjeanty in Laghampton, Gloucestershire, for which the service was to be the king's cook ; and because the tenant did not do that service, it was changed to another service (g) ; it appears (h) that the substituted service was the payment of twelve pence rent, and doing the fiftieth part of the service of a knight's fee. A similar alteration was made respecting another serjeanty in the same township. Lands at Chilth'm (qu. Cheltenham) held <i>de serjeantiâ coquine</i> (i). Lands in Aschele, Norfolk, per <i>serjantiam panetrie</i> (k). Lands at Westhanced, Berks, by the serjeanty of serving beer in the king's butlery (l). Lands in Windsor, by that of keeping the king's houses at Windsor (l). Lands in Bray, per <i>serjeantiam serviendi de ocreis domini regis</i> (l). Lands in Nethercourt, by the serjeanty of having a <i>pourpoint</i> (<i>perpunctum</i> (m) coat-armour) and an iron cap, in the king's host, for forty days, at his own cost (l). Lands at Elton, in Oxfordshire, by the serjeanty of finding an usher for the door of the queen's bed-chamber (l). Lands in Netherhaughton, by the serjeanty of</p>	
Measuring fortifications.		
Keeping castle gate.		
Summoning and distraining barons.		
Summoning bishop.		
Measuring castle, and keeping workmen.		
Guarding prisoners of war.		
Emptor coquine.		
Cook.		
Alteration of service.		
Serjeantia coquine. Serjeantia panetrie. Beer.		
Boots.		
King's host.		
Usher.		

(a) Testa de Nevill, 70 a. (b) Ib. 67 a ; *post*, 292 (m). (c) Ib. 70 b.
(d) Ib. 73 a. (e) Ib. 77 b. (f) *Ante*, 284 (a).
(g) Testa de Nevill, 78 a. (h) Ib. 78 b. (i) Ib. 81 a.
(k) Ib. 290 a ; 2 Rot. Parl. 413. (l) Ib. 108 b. (m) Ducange.

carrying a banner in the host for forty days at his own cost (*a*). *Appendix.*
 The whole town of Brochton, in Oxfordshire, by the serjeanty of Training hawks.
 carrying and mewing one falcon of the king (*a*). Lands in Carrying the
 Netherhaughton, Oxfordshire, by the service of carrying unum pennoncel.
 penecellum an' petalliam hundredi de Woketon (*b*). Land at Keeping the
 Windsor, by the serjeanty of keeping the king's vineyard (*c*). vineyard.
 Land at Bretton and Dulton, in Wiltshire, by the serjeanty of Larderer.
 keeping the king's larder; which serjeanty was changed by the
 tenant, by his own authority, into finding the king one serjeant-
 horseman armed, in his army in England, at his own cost (*d*).
 On account of this change having been without warrant, he was to
 do the service of half a knight's fee, in addition to the pecu-
 niary services at which the serjeanty was arrented by fine in re-
 spect of alienation in part (*e*). Land at Weveryngg (Kent), by the Carrying scul-
 serjeanty of finding the king, when he goes into Wales, one horse, lery.
 with a sack and goad, to carry his scullery (*f*). Land in Kar- Carrying her-
 lethon (Suffolk), in serjeanty, by the service of carrying to the rings.
 king, wheresoever he should be in England, 24 pastillos of the
 first fresh herrings on the part of the bailiffs of Norwich (*g*).
 Land held by the serjeanty faciendi canestill' (*h*). Land held per Making cane-
 serjantiam tuallie ad coronacionem domini regis (*h*). Land held still (*k*).
 per serjantiam bacinorum ad coronacionem regis (*h*). Land held Presenting
 per serjantiam custodiendi parcum regis (*h*). Land held towel.
 per serjantiam lardarii domini regis. Land at Hupton or Opton Holding basins.
 (Northamptonshire), by the serjeanty of finding unum servien- Keeping park.
 tem itinerantem in Hundredo de Neuhocilg've, or Neubotleg've, Finding a ser-
 ad faciend' precept' vic' Northampton' ex parte domini regis (*i*). jeant-itinerant.
 A serjeanty was held in Yorkshire by the service of being keeper

(*a*) Testa de Nevill, 108 a, b. David de Seyredun tenet unam virgatam terre in Seyredun et in Sappesleg, per servicium sergentie inveniendi duas sagittas cum Arrows for hunt-
 dom. rex venerit venari in Foresta de Dertemore; et ita tenuerunt antecessores ing in Dart-
 sui post conquestum. Ib. 195 a. (*b*) Ib. 118, 119; 1 Palgr. 305. (*c*) Ib. 129 a. moor.

(*d*) Willielmus cognomento Cocus, serviens Richardi regis Anglie, in custo- Serjeant-horse-
 diendo castellum de Leuns cepit de familia regis Francie 24 servientes equites, men.
 quos Rex Francie miserat ad muniendum castellum de Novomercato. Hoveden
 in Richard I. (*e*) Testa de Nevill, 146 a, b, 147 b.

(*f*) "Cum sacco et brochia pro esquiler ipsius patris regis cariaud."—Rot. Orig. in Scacc. Abbr. ii. 26. Brochia is here evidently derived from "broche," veru. Sometimes the tenant is to furnish equum cum sacco et stimulo, or cum sacco et pryk. Ib. 240 a, 325 a. Vide ib. 174 b, 245 a; F. Garde, 145; ante, 286.

(*g*) Testa de Nevill, 283 b. (*h*) Ib. 276 a. And see 162, 349, 388.

(*i*) Ib. 32 b, 33 b. Willielmus filius Michaelis tenet unum toftum in Hag- Summoner in
 wrthengh'm (Lincolnshire), per servicium existendi summonitoris in wapen- wapentake.
 tachio. Et valet per annum vi^d. Ibid. 348 b. Afterwards said to be held
 per serjantiam faciendi summoniciones cum serviente in wapentachio. Ib. 352.

(*k*) Qu. "canefill," which see, Spelm. Gloss.

Appendix.

Furnishing a
serjeant to do
the king's
business.

of the gaol of the forest, and of selling cattle taken for the king's debts (a). The jurors say, that the Earl of Albemarle ought to present his serjeant to do the king's business within the wapentake of Houderness (a). Land in Lancashire held by the serjeanty of being reeve (b); and by the serjeanty of the wapentake (c). By the serjeanty, inter alia, ad faciendum attachiamen-

(a) Testa de Nevill, 375 a; and see ib. 195 a.

(b) Ib. 409.

(c) Ibid. This seems to be the same service as that which was to be performed (by deputy or in person, *post*, 296 (f),) by the Earl of Albemarle, corresponding with that of the old Norman serjeants of the sword, *servientes spatæ*.

"D l'Office de Serjent.

"La Coustume, au chapitre—De l'Office du Viconte.

Sergens de
l'espée.

"Sous les vicontes sont les sergens de l'espée, qui doyent tenir les veuës, et faire les semonces, et les commandemens des assises, et faire tenir ce qui est jugé, et delivrer par droit les namps qui sont prins. Et pour ce sont ils appelez sergens de l'espée: car ils doyent justicier vertueusement a l'espée et aux armes, tous les mal-fauteurs, et tous ceux qui sont diffamez d'aucun crime, et les fuitifs. Et pource furent-ils establis principalement, à fin que ceux qui sont paisibles fussent par eux tenus en paix, et les mal fauteurs fussent punis par la roideur de justice. Et par eux doyent estre accomplies offices de droit. Les Bedeaux sont mendres sergens qui doyent prendre les namps, et faire les offices qui ne sont si honnestes, et les mendres semonces." Terrien, Commentaire, 74. In the following page is a decree made in the Exchequer at Rouen in 1426.—"Que les sergens royaux ayent chacun un sous-sergent en sa *sergen-terie*, sans deroguer à la teneur de la charte aux Normans."

Land in Cum-
berland, held
by the tenure
of providing
land serjeants,
or keepers of
the peace.

"Cumbr.' Ricardus de Luci petit versus Adam filium Johannis quod faciat ei servicium et consuetudines quas ei facere debet de libero tenemento quod de eo tenet in Breseko; scilicet, quod debet receptare et hospitari et pascere quinque forestarios suos cum ad eum venerint, et invenire eis sectam ad testandum malefacta foreste sue. Dicit etiam quod debet habere *quatuor landservientes*, custodes, scilicet, pacis patrie, duos, scilicet, ex una parte aque de Egend' et duos ex alia parte illius aque de Egend', et illos duos qui erunt ex illa parte aque ubi ipse manet, debet ipse hospitari et pascere, et invenire eis sectam ad testandum malefacta pacis. Et preterea petit de ipso, et de hominibus terre sue, de omnibus averiis suis et universis rebus, unde theolonium debet surgere, que vendite fuerunt, ubicunque vendantur. Ita quod theolonium illud portari debet ad castellum suum de Egremunt infra diem dominicam proximam post vendicionem factam, et si ultra dominicam detentum fuerit, ipsi erunt in forisfactura sua, et reddent ei theolonium. Et Adam venit et cognoscit ei servicia et consuetudines que terra sua debet, et debuit a conquestu Anglie; scilicet, quod ipse debet esse forestarius suus *se tercio* ex feoffamento antiquo ad custum suum proprium, et debet receptare et hospitari et pascere *unum* landservientem ex una parte aque in communi, sicut ei acciderit, scilicet, ex illa parte aque ubi ipse manet. Cognoscit etiam quod de hominibus ejus debet ipse habere theolonium de omnibus rebus suis venditis, unde theolonium surgere debet, sed ipsemet de omnibus rebus suis propriis venditis quietus esse debet. Et predictus (Adam) cognoscit quod debet *awaitam maris* facere. Et ponit se in magnam assisam Domini Regis, &c. Consideratum est quod magna assisa inde fiat, &c. Dies datus est eis, &c. Rot. 4, Plac. Abb. 42 b. And see further as to the office of Serjeant of the Peace, Ellis, *Introd. to Domesday*, 179; *ante*, 224; *post*, 303.

Awaita maris.

corone, et alia attachiamenta que pertinent ad vicecomitem, ubi vicecomes et servientes sui non possunt attingere (a). Land in Hecham (Northamptonshire), in serjeanty by the service ferendi brevia de Honore de Hecham (b). Richard, prepositus de Dereby (Lancashire), held twelve oxgangs of land, ut sit prepositus (c). Adam de Moldat, four oxgangs in Crossley (Lanc.), per serjantiam ut sit prepositus (c). Robertus de Curton held half a carve of land in Querton (Lanc.), per serjantiam prepositure (c). Land in Northumberland was held by the serjeanty breviandi placita corone versus vicecomitem (d), et faciendi summoniciones. Another serjeanty in the same county was held by the service breviandi et faciendi districciones (d); another by the service custodiendi brevia corone (d); and another by the service eligendi (qu. colligendi) den' regis. 3 Hen. III. (d). Lands in Welleby (Warwickshire), by the serjeanty of being marshal ad placita domini regis (f). The free (g) manor of Bradepole (Dorset), by the serjeanty of summoning to the county court (h). A messuage in Eling (Hants), by the serjeanty of being bailiff itinerant in the Isle of Wight (i). Lands in Natferton, Matfen del West and Loverbothill, Appendix.
Carrying writs.
Being reeve.
Execution of process.
Serving as coroner (e).
Marshal ad placita regis,
Summonses to county court.
Bailiff itinerant.

(a) Testa de Nevill, 393 a. Willielmus filius Odonis tenet in capite de domino rege unam carucatam terre cum pertinenciis in Bamburg, per servicium serjantie, ut faciat districciones pro debitis domini regis, et ut portet brevia domini regis inter Tuedam et Coket. Et omnes antecessores sui tenuerunt per idem servicium post tempus Willielmi Regis Ruffi. Ib. 393. Henricus de Waleton tenet xiii. bovas terre in Waleton, &c. (Lancashire) per serjantiam vavassorie. Ib. 409 b. *Vide ante*, 185, 186. Making distresses, and carrying writs.

(b) Testa de Nevill, 376.

(c) Ib. 409 b.

(d) Ib. 391 a.

(e) *Vide post*, 292.

(f) Ibid. 93 a.

(g) The term *liberum manerium* was probably used because the manor, being a serjeanty, was exempt from escuage, &c., Wright, Ten. 26; unless *customary* manors were so common in Dorset, that the ordinary freehold manor at common law required a distinctive name. *Vide* 5 Mann. & Ryl, 155, 156; *post*, 293. Free manor.

(h) Ibid. 167 a. "Serjantia Radulphi de Gorges et Elene uxoris ejus, de Bradepol, que quondam fuit Toraldi de Papilloyn, pro qua debuit domino regi unum servientem armatum cum lineis armis in exercitu suo in Dorset, per xi. dies super custum proprium, alienata est per particulas:— Finding a serjeant at arms.

"De Radulpho de La Dune pro x. acris terre et uno molendino de eadem serjantia, alienatis, que tenet,—per annum dimidio marce.

"De Radulpho de Gorges pro vi. virgatis et dimidio et duabus acris terre, quas Eudo Filliol, Willielmus de Stikelane, Baldwinus de Caln, Rogerus de Abindon, Robertus Pistor, Adam Pane, Isabella uxor ejus, Emma soror ejus et Hugo Serle, de eo tenent, et quadam libertate quam Monachi de Ford (Ford Abbey in Devonshire) de eo tenent,—per annum 30 solidis. Et faciet predictum servicium consuetum." Testa de Nevill, 171 b.

(i) Rot. Orig. in Scacc. Abb. ii. 270 b. In Testa de Nevill, 231 b, the service is thus described. "Ricardus de Eslenges tenet in Eslenges unam Carrying writs.

<i>Appendix.</i>	in serjeanty pro placitis corone custodiend' (a). This is called in
Serjeant coroners.	the next page, serjantia pro corona domini regis infra comitatum Northumberland; and in pp. 352, 393, Matfeven and Naferton are
	said to be held by the same party, Philip de Ulecot, per serjantiam ut sit coronator. A burgage in Lancaster, held of the serjeanty of Robert, son of Roger de Skeerton (b). Land in Lancaster,
Serjeant-smiths.	per serjantiam faverie (c). Land in Glentwrthe (Lincolnshire),
Usher in eyre.	by the service of being usher in the eyre of the justices in the county of Lincoln (d). Many serjeanties arrented in Cumber-
Cornage.	land, are stated to be held by cornage (e); some by drengage (f);
Execution of process.	some by the serjeanty of an aerie of hawks; some by the serjeanty of carrying the king's writs in the county by and at the command of the sheriff (g). Land in the suburbs of Carlisle, by
Iron work.	the serjeanty of furnishing the king with iron work (ferramenta) for the gates of Carlisle (h). Lands in Winterburn, Wiltshire,
Wood, litter.	by the serjeanty of keeping and delivering out the king's wood and litter (i). Lands in Alwardebeer, by the serjeanty of keep-
Dogs.	ing in the king's courts his canes haeriet (k) at the king's cost.
Claretum.	Lands at Winterslauwe, in Wiltshire, by the serjeanty faciendi claretum (l). Lands in Coombe, by the serjeanty of keeping
Foresters, chamberlain, huntsman, usher, &c.	the king's forest, of being the king's chamberlain, of being the king's huntsman, of being the king's usher (m), of being mar-
	virgatam terre de veteri seoffamento, per serjantiam ferendi brevia vicecomitis in insulam, et ad faciendum attachiamenta domini regis."
	(a) Testa de Nevill, 388 a. And see ib. 391; 1 Mad. Exch. 463; post, No. LXXI. (b) Testa de Nevill, 410 a.
Faveria.	(c) Ib. 410 a. Spelman says, "Faverca usurpari videtur in MS. Rivalensis monasterii pro molendino ferrario, vel pro fodina, ubi ferrum eruitur." Gloss. in verbo. Faveria, as above, seems to be the true word.
Wand-bearer before justices.	(d) Ib. 349 a. Land was also held there per serjantiam quod debet esse coram rege vel coram justiciariis cum in illas partes venerint, ib. 352 a; and also per serjantiam portandi unam virgam coram justiciariis itinerantibus apud Lincoln de omnibus placitis. Ib. 292 b.
	(e) Et notandum quod omnes supradicti tenentes per cornagium, ibunt ad preceptum regis in exercitu Scocie, scilicet, in eundo, in antewarda et in redeundo, in retrowarda. Ib. 380 a, 381 b. And see ib. 409; F. Garde, 148.
Serjeants holding by cornage to lead the van and, in returning, to cover the rear.	(f) As to this tenure, which appears to have been common in the northern counties, temp. John and Henry III., see Testa de Nevill in those counties.
	(g) Ib. 380 a, b, 381 a, b, 393, 410 a. (h) Ib. 380.
	(i) Ib. 146 b. This serjeanty being alienated in part, was commuted for a money rent, and the service of half a knight's fee. And see ib. 357.
	(k) Qu. Harriers, vide Cal. Rot. Pat. 261, a; but canes aericii are afterwards mentioned. Testa de Nevill, 146 b, 147 b, 148 b.
	(l) Testa de Nevill, 147 a. Claretum was a mixture of wine, hipocras, &c. a sort of bishop.
Serjeanty of the ushery at Rouen.	(m) "Hue Waspal tient sa terre par sergenterie, et doit garder la porte du Chasteau de Rouen"—Ducange, voce Serviens. And see Testa de Nevill, 393.

shal of the door of the king's kitchen, of being the king's archer, and of keeping two wolf-dogs (a). Land in Burston (Norfolk), by the serjeanty of selling cattle in Norfolk and Suffolk, for the king's debts (b); and other land in Norfolk and Suffolk, by the serjeanty of buying such cattle (c). Land in Saunford (Suffolk), by that of leading serjeants into Wales at the king's cost (d). Land in Stanhoie, Suffolk, in capite de domino rege, per serjantiam venacionis (d). Land in Pitterll (Northamptonshire), by the serjeanty of being venator leporum,—the service done annually (e). Land was held in Pappeworth (Cambridgeshire) per serjantiam, pro qua debuit pascere et vestire duos pauperes singulis diebus de elemosina pro anima regis, et antecessorum et successorum suorum (f). Land was held by the serjeanty dicendi quinquies oracionem dominicam, cum salutacione beate Marie, de die in diem, per annum, pro anima regis Johannis et animabus heredum suorum (g). Kingeston (Dorset) was held by Russell of the king, ex tempore Willielmi Bastardi, quondam regis Anglie, by the serjeanty of being marshal of the king's butlery at Christmas and Whitsuntide (h). Land in Welles (Dorset), by the serjeanty of making the king's bread in the Hundred of Winfrod (i). The free manor (k) of Winfrod (Dorset), by the serjeanty of giving water to the king at Christmas, Easter and Whitsuntide (l), in the absence of the Earl of Oxford. The free manor (k) of Lasterter, Somerset, by the service of one heron or

Appendix.

Selling distresses.

Leading serjeants into Wales.

Serjantia venacionis.

Alms.

Lord's prayer.

Ave Mary.

Butlery.

Bread.

Water.

Heron.

(a) "Duos lueretios," Testa de Nevill, 149 a. Vide ib. 149 b., post, 298.

(b) Testa de Nevill, 283 a, 294 a; Mad. Exc. 670; quarto ed. ii. 196.

(c) T. de Nevill, 286 a.

(d) Ib. 295 b, post, 294. *

(e) Ib. 37 b.

(f) Ib. 337.

(g) Rot. Or. in Scacc. Abb. ii. 10.

(h) Testa de Nevill, 165 a. In the following century, the manor (which then acquired its present name of Kingston Russell) is stated to be held by the service of counting the king's chessmen (numerandi familiam de scaccario domini regis, see Lib. Quot. Garderob. 350, 351), and putting them in a box when he had finished his game. Rot. Orig. in Scacc. Abb. ii. 29 b. Manor of Kingshome (Gloucestershire), held by the serjeanty of keeping the pantry door at the coronation. Ib. 174. (i) Testa de Nevill, 166 b. (k) Vide ante, 291.

Chessmen.

(l) The tenure is more particularly described afterwards (171 b) thus—

"Serjantia Henrici de Neuburgh in Wineford, pro qua debuit dare aquam ad manus domini regis die natali Domini, Pasche et Pentecostes, et habere pelves et manigeria, nisi comes Oxon. presens esset, alienata est in parte per diversas particulas:—

"De Willielmo de Cumbe, pro una hida terre de eadem serjantia, alienata, quam tenet,—per annum di' marc'. Et faciet servitium quadrag' partis unius feodi,—a knight to serve for one day instead of forty.

"De Roberto de Cheseburn' et Johanna uxore ejus, pro tribus virgatis, &c. Et faciet servitium quadragesime partis unius feodi.

"De Alicia et Avicia, filibus Roberti de Escot, pro tribus partibus unius

<i>Appendix.</i>	crane [unius gruis], per serjantiam. The free manor of Windleshore (qu. Broadwinsor) Dorset, valued at 15 <i>l.</i> per annum, by the
Fundator scaccarii.	serjeanty fundatoris scaccarii (<i>a</i>). The manor of Eslyngton &c. (Northumberland), by the service of rendering 4 <i>l.</i> per annum to the king, at his exchequer of Newcastle-upon-Tyne, of doing
Carriage &c.	to the king foreign service of carriage, of doing suit at the county court, and truncage at the castle of Baumburgh (<i>b</i>).
Park.	Lands at Mulleford (<i>c</i>), by the service of finding a man to keep the king's park and forest at Claryndon (<i>d</i>). The serjeanty of
Wolves &c.	Laxton in Northamptonshire, by the service of hunting and taking wolves, foxes, cats, and other vermin (<i>e</i>). Lands in Pightester (Northamptonshire), by the serjeanty of finding dogs at the tenant's expense to destroy wolves, foxes, weasels, cats, and other vermin, in Northamptonshire, Rutlandshire, Oxfordshire, Essex, Hants, and Bucks (<i>f</i>). Lands in Manesfield Wudehus (Notts), per servitium capiendi lupos (<i>g</i>). Land in Causton and Stanhog (Norfolk), by the serjeanty of keeping one wolf-dog (<i>h</i>).
	The sums payable by the parties to whom the serjeanties were arrented, were received with other branches of ordinary revenue

virgate terre de eadem serjantia, alienatis, quas tenent,—per annum v. solidis. Et facient servitium sexagesime partis unius feodi.

"De Roberto filio Elye, pro una virgata terre de eadem serjantia, alienata, quam tenet,—per annum 2 solidis, 6 denariis.

"De Johanne de Valle Torta et Alicia uxore ejus, pro una virgata et quarta parte unius virgate terre de eadem serjantia, alienatis (quas tenent),—per annum 6 solidis, 4 denariis. Et facient servitium tricesime partis unius feodi."

(*a*) Testa de Nevill, 166 b. The tenant of the same, or another serjeanty at this place, is called ponderator denar. ad scacc. dñi regis, ib. 171 b, 417 b.

(*b*) Abb. Rot. Orig. in Scaec. ii. 8 a, 207 a, b. And see the former tenure, Testa de Nevill, 389 a, 393 b.

(*c*) Milford, near Salisbury.

(*d*) Abb. Rot. Orig. in Scaec. ii. 227 b.

(*e*) Ibid. 247 a.

(*f*) Ibid. 296 a. And see ib. 389.

(*g*) Testa de Nevill, 16 a.

(*h*) Per serjantiam servandi unum livarium, ib. 283 a, afterwards said to be per serjantiam custodiendi unum livarium, ib. 290 a. Vide ib. 164 a, ante, 292.

In Plac. Abb. 283 b, it is said that the deer, which the Earl of Gloucester had given to William Poer to stock his park at Farley in Worcestershire, had been destroyed by wolves. Licence to kill wolves in all the king's forests in England was granted to John Gifford de Brymmesfield in 9 Edw. I.; and in the same year, licence to kill wolves in the king's forests, in certain counties, was granted to Peter de Corbet, Cal. Rot. Pat. 49. The importance attached to the service of destroying wolves in Scotland, in the fifteenth century, appears from the following enactment. "The schireffes suld hunt and slay the wolfe, and her quhelves, three times in the zier; and all in-dwellers of the shire suld ryse with him, upon paine of ane Wedder." Statute of James II. (who died 1460), Parl. 14, cap. 88. Skene, De Verborum Significatione, tit. Schireffe.

Wolves in
Scotland.

arising in the county, by the king's collector or reeve (a). But by the successive debasements of the currency, the sums reserved upon these arrentations became so insignificant in value, that in course of time they generally ceased to be collected at all.

Appendix.

Besides the arrentationes serjanterium, many of which record the tenure at the moment of its extinction, the nature of the service constituting a particular serjeanty sometimes appears from other documents in which it is noticed as still existing.

"Rex cepit homagium Radulphi de Levelaund, filii et heredis Margerie, que fuit uxor Fulconis Peyforer defuncte, qui (b) de rege tenuit in capite (c), de serjancia custodie pallacii Westm. (d) et libere prisone regis de Flete (e) &c." 6 Edw. I. (f)

Palace of Westminster, and Fleet prison.

"Rex eidem escaetori, salutem: quia accepimus per inquisitionem, quod Bertrandus de Croyel defunctus tenuit &c. manerium de Setene in comitatu Kancie per serjantiam inveniendi

Ventrer.

(a) The shire-reeve (sheriff), as the term imports, was merely a collector of the king's revenues, within the county. As the intervention of this officer was in ease of the king's debtors, who would otherwise have been bound to attend in person to make their payments, the shire-reeve was the agent of the subject as well as the officer of the king. He was therefore commonly elected by the county, who were answerable for his defaults. (2 Rot. Orig. in Scacc. Abb. 124.) So the reeve of a manor whose duty consists in collecting the lord's rents, is chosen by the homage, the members of which are the parties from whom the collection is to be made. 3 Mann. & Ryl. 160, 2, 170, 6, 201, 10; 1 Palg. 82. But in the absence of the earl or alderman (the civil governor of the shire or county) the shire-reeve performed the duties of that office; and upon the Conquest the Norman lawyers found the sheriff in the exercise of the function not only of collector, but of deputy civil governor of his county. In respect of the latter of these functions, they gave him the designation of viconte (vicecomes), and in respect of the former, that of baillif (ballivus), though in Normandy the offices of viconte and the bailif were distinct. In English, however, this officer whether acting in one capacity or the other, was known only by the original name of shire-reeve or sheriff; on the other hand, in law Latin, vice-comes, the title derived from the secondary functions of this officer, is applied to him in both branches of his office; but baillif, ballivus, is obsolete, except in its derivative form of balliva, bailiwick, a term still used to designate the district over which the jurisdiction of the sheriff extends.

Sheriff.

Reeve.

Vicecomes.

Baillif.

(b) In these records "qui," agreeably to the French use of the word, is of all genders. Here it seems to be feminine, as it is evidently the mother, and not the father, from whom the serjeanty descended. From the difference of name it would rather appear that Fulk Peyforer was the second husband of Margaret.

(c) As to tenure in capite, see *ante*, 232; Testa de Nevill, 163 a.

(d) As to this palace, see Rot. Parl. i. 150 a, 155 a, 316 b, 378 a, 405 a, 406 b; iii. 128 a, 452 b; v. 110 b, 194 b, 467 b, 468 a, 474 a, 492 a, 530 a, 537 b; vi. 380 b; 2 Rot. Orig. in Scacc. 5, 23, 4, 31, 71, 111, 202, 11, 17, 18, 37, 38, 55, 319; Memorand. in Scacc. Mayn. 47.

(e) As to which, see Rot. Parl. i. 47 b; ii. 211 b; iii. 25 a; v. 110 b.

(f) 1 Rot. Orig. in Cur. Scacc. 29 b. And see Maynard, 47; *post*, 301.

Appendix.

Nobis, quando contigerit ire in Vasconiam, unum hominem vocatum ventrer, ad ducendum tres leporarios Nostros quousque idem ventrerius perusus fuerit uno pari socularium precii quatuor denariorum, ad custum Nostrum, et quod idem Bertrandus non tenuit alias terras &c., quodque Johanna, uxor Ricardi de Rokesle, soror ejusdem Bertrandi &c. cepimus fidelitatem ipsius Ricardi &c. Et ideo vobis mandamus accepta securitate &c. (a)

Ventrer.

Here the service to be performed by the ventrer is defined; he was to lead three of the royal greyhounds when the king should fortune to go into Gascony, at the king's expense, until the ventrer had worn out a pair of shoes of the price of 4*d*. The ventrer was perhaps the same officer as the fugator (b) or huntsman of other antient records. Thus we find (b) grants from the crown of the office of alderman in consideration of the grantee's finding one huntsman (unum fugatorem) to the king when he should hunt in a neighbouring forest. The manor of Seaton appears to have come afterwards to Richard Rokesly, knight, probably a descendant of Richard and Joan; for according to a record (c), cited by Lord Coke (d), "Ricardus Rockesly miles tenebat terras Seatoniae in Com. Kant. per serjentiam esse (e) *vantrarium* regis in *Gusconia* donec perusus fuerit pari *solutarum* precii iiii. den." This latter record gives no explanation of the term *vantrarius*, and Lord Coke has translated it "the king's *fore-footman*." Spelman (Gloss. in verbo), citing this passage from Lord Coke (but writing "vantarius" instead of "vantrarius"); says, "Assecla regis qui cæteros suos assecclas *prægreditur*." Ducange, who professes himself unable to understand the record vouched, or the explanation given by Spelman, suggests that the true reading may be "ventarius," a collector of

Fugator.

(a) Abbr. Rot. Orig. in Scacc. i. 150, 151.

(b) "Thomas de Everwic, filius Uliveti, debet unum *fugatorem*, ut sit aldermannus in Gilda Mercatorum de Everwic." Magn. Rot. 5 Steph. (rather, 31 Henry I. *vide ante*,) rot. 15 a; 1 Mad. Exch. 397, chap. xi. s. 2 (m). "Uctredus, filius Walleof, reddit compotum de viginti marcis argenti et tribus palefridis et tribus *fugatoribus*, pro soca et saca, quæ (quas) Rex ei concessit." Ibid. Rot. 3b. Norhumb. ibid. (n). And see 1 Ellis, Introd. Domesday, 92, 110.

(c) Rot. Fin. M. 11 Edw. II.

(d) Co. Litt. 69 b.

Service to be done by tenant in serjeanty himself, if none other be found to do it.

(e) In the more antient document relating to Croyel, the word is not "esse," but "inveniendi." The legal effect is the same; because where a tenant has a service to do by the body of a man, if he cannot find a man to do the service for him, he must do it himself. Litt. s. 157; 11 Hen. IV. fo. 72. From the different wording of the two records in this and other particulars, it may be inferred that the service was not reserved in writing. Two translations from the same written document could hardly have varied so much.

impost. In 38 Hen. III. (1253) Roger de Langeford held a serjeanty in Mantford, Surrey, "pro quâ debuit esse *veotrarius* domini regis."^(a) "Veltrarius, vaurarius, is described, Lib. Nig. Scacc. 356, as *veltricus* canibus præfectus ^(b)." Ducange seems not to have been acquainted with the word "veltrarius," which is not to be found in the edition of the Glossary published by himself in 1679, or in the Frankfort edition of 1710. It appears in the Benedictine edition of 1736. As Ducange writes "vaurarius" instead of "vantrarius," the word used by Lord Coke, he would probably not have hazarded the suggestion of "ventarius," if he had been aware of the existence of the term "veltrarius." Whether "veltrarius" and "ventrarius" had precisely the same meaning appears to be doubtful ^(c).

Ventrer.

In the Coustume de Normandie, in the Chapter, "De Court," it is said: "Les chevaliers, et ceux qui tiennent franchement les contez, les baronnies et les autres dignitez fieffaux, ou les fiefs de Haubert, ou *franches sergenteries*, ou autres frâncs fiefs, ont la court de leurs resseans és simples querelles, et les legeres et pesantes de meuble, d'héritage, et de larcin." On which Terrien observes^(e), "Sergenteries—Combien que les sergenteries feudales se releuent comme fief de Haubert, toutesfois il n'y a court, *usage* ^(f), justice ou jurisdiction, si elles ne sont jointes à quelque fief noble: comme est la sergenterie du Val de Dun en la Viconté de Arques, laquelle est jointe et unie à la Visconté hereditail de Blossville; le seigneur de laquelle Visconté a la cognoissance et jurisdiction du meuble ^(g) entre les resseans de toutes les paroisses de la dite sergenterie."

Norman serjanties ^(d).

So late as the last century, inheritances in that Duchy were divided into héritages partables and héritages non-partables ^(h). In the former class were included lands held en roture (socage), en bourgage (burgage), and en franc aleu (allodial lands), rents and some offices. The héritages non-partables, consisted of lands held by knight's service (les fiefs nobles), and serjeanties

(a) Plac. in Dom. Cap. Westm. Abb. 135 a. Afterwards, in 1300, we find Serjantia Rogeri de Langeford in Mainford (Surrey), pro qua debuit ipse *vetrius* domini Regis, alienata est in toto. Johannes de Gadesden tenet totum. Et idem Johannes fecit inde finem; videlicet, per annum xx. sol' faciendo servicium vicesime partis feodi unius militis. Testa de Nevill, 229 a; and see *ante*, 194.

(b) *Veltrarii*, Blount's Ancient Tenures. See Spelm. Gloss. *Canes*.

(c) "Ventrer," supposing it to be a distinct word from *veotrius*, may, if not a corruption of "venator," be possibly a tenant by cornage. Littleton says, (sect. 156,) "*ventier un cornu*," to wind a horn. Crag. Jus Feud. Lib. i. Tit. i. § 5.

(d) *Ante*, 290, 292.

(e) Terrien, Comment. 87.

(f) Hence perhaps our customary tenures.

(g) Personal actions.

(h) Frigot, Coutume de Normandie, 225, 367.

Appendix.

(sergenteries nobles). Lands held per serjentiam (les sergenteries glebées), and vavassories held by knight's service (les vavassories nobles), were, in common with land held by knight's service, liable to the feudal right of wardship (la garde noble).

No. LXXI.

Serjeants ad placita coronæ custodienda in 1210.

Alanus filius Ketelli debet xxx. marcas et j. palefridum, ut inquiratur utrum Alanus amovit (a) Servientes qui custodiebant placita corone Regis in Copland, necne.—11 *Johann.* (b). The coroners of Leicestershire are called custodes placitorum coronæ in a record of 8 *Johann* (c).

No. LXXII.

Grant of Land by Henry III. to his Serjeant, and grant of a Wardship by Edward III. to his Attorney.

Pro Magistro (d) Paulino de Baump-ton. } Rex Henrico de Bathon et sociis suis, justiciariis assignatis ad tenendum placita coram Rege vel consilio suo atterminata, salutem. Sciatis, quod si contingat Nos vel heredes Nostros recuperare unam carucatam terre cum pertinentiis in la Wychall in manerio de Bremesgrave &c., quam Nos petimus versus Ricardum de Coston, tamquam escaetam, prædicta terra dilecto *Servienti* nostro Magistro Paulino de Baump-ton et heredibus suis de concessione nostra imperpetuum quieta remaneat, &c. In cujus, &c. T. R. apud Portesmue (e).

We find the wardship of an infant heir, who was in ward to the crown, granted to the king's attorney in recompense of his services. "The king, for the good service with which Thomas de Totyngton has performed in prosecuting the king's business,

(a) Whether this amotion was by letter under the sign manual addressed to the Lord Chancellor, does not appear. The process may have been still more summary.

(b) *Mad. Exch.* quarto ed. i. 442 (g). And see 4 *Edw. I.* st. 2; 28 *Edw. III.* c. 6; *Mirror*, c. 1, s. 3; *Spelm. Gloss. Furca et fossa*.

(c) *Plac. Abb.* 55 b. And see *Hoveden*, 795; *Testa de Nevill*, 391, 394; *Britt.* c. 1,—*De Coroners*; 1 *Palgr. Commonw.* 297; *ante*, 291, 292.

(d) Therefore not *serviens ad arma*, but a gownsman, *serviens ad legem*.

(e) *Rot. Pat.* 37 H. III. 1253.

both in the Common Bench and in the King's Bench, has committed to him the charge of all the lands and tenements which were of Walter de Pateshull, deceased, and which &c. he held by knights' service in the town of Euston in the county of Suffolk, and which &c. the lawful age of the heir &c., yet so &c." 6 Edw. III. (1332) (a).

Appendix.

No. LXXIII.

Extract from Writ of Privilege.

" Quidam tamen Henricus Episcopus Wintoniæ (b) et Johannes Podridg, curie nostre predictæ privilegia nescientes, ne ingendo, nec indigendo Ministerium Johannis M. servientis ad legem, qui ex officio incumbit in curia illa (c) potius quam in alia, ministrare, præsertim cum eadem curia alterius gradus personarum, quam servientes ad legem, non permittit."—*Serjeant Martin's Case, temp. Hen. VI. (d).*

Duty of serjeants to attend Court of Common Pleas.

No. LXXIV.

Fleta, lib. 2, cap. 37.—De Narratoribus.

In curiâ autem Reg' sunt servientes-narratores, attornati, et apprenticii: de quibus constitutum est (e), quod nullus deceptionem aliquam vel collusionem in curiâ, ausu temerario, facere præsumat, vel facere non consentiat in deceptionem cur', pro cur' vel aliquâ parte recipienda, sub poena imprisonment per unum annum et unum diem, et ulterius. Et ulterius in curiâ Regis pro aliquo narrare non audietur nisi pro semetipso, si narrator fuerit (f). Et quod dicitur de narratore, intelligatur id dici de quolibet alio quantum ad imprisonment; et majorem poenam subibit, si quantitas delicti hoc postulaverit, pro dispositione et voluntate Regis (g).

Countors &c. guilty of deceit.

(a) Rot. Orig. in Scacc. Abb. 67 a.

(b) Cardinal Beaufort, who died in 1447.

(c) *Vide ante*, 209, 217, 236.

(d) Cited Cro. Car. 84.

(e) 13 Edw. I. (Westm. I.), c. 29. And see *ante*, 71, 72, 167.

(f) This qualification seems to imply that unless the party were a narrator he could not plead his own cause. And see *ante*, p. 268, No. LXII.

(g) And see Britton, cap. xxi.—*De Ministres.*

Appendix.

No. LXXV.

Serjeanties Appendant, or in Gross.

The right to exercise a particular office, and the liability to perform the duties of that office, were so commonly annexed to land, that the land itself acquired the name of serjeantia, as appears by many of the serjeanties in the preceding pages. The use of the term in this sense was sanctioned by the Court in the following case.

Distinction between serjeanties and services of serjeanty.

“Two parceners brought a writ of right against one William, and counted of the seisin of their grandfather, and tendered suit and proof.

Devom (a).—The tenements which now are in demand by this writ, were sometime in the seisin of King Henry, &c. ; who, out of his seisin, gave them to Roger, father of William, by his deed which here is ; without whom &c. ; and we pray aid of him (b) ; and he put forward charter which purported, that King Henry gave and granted to Roger and his heirs, the serjeanty of C.

Wall (qu. Walledene).—We demand by writ of right, land which lies in demesne, and the charter which he puts forward speaks only of *serjeanty*—which is only of the *services*. Judgment if by that (by praying aid in respect of a different matter from what we demand) you can delay our plea.

Herle.—One has seen a manor pass by the grant of a knight's fee, and in such case if he be impleaded of the manor, you shall not tender his voucher.

BER (qu. BEREฟอร์ด), J.—There is serjeanty, and there is service of serjeanty ; but by the charter which he puts forward, King Henry gave the serjeanty to hold of him, and by the ancient services &c. Then, inasmuch as he gave the serjeanty, it is to be understood the land out of which the services of serjeanty are issuing ; and so it is to be understood in all the ancient books of the king in the Exchequer. And he had (aid) &c.” *Mem. in Scacc. M. 12 Edw. II. Mayn. 358.*

Sergenterie glebée and sergenterie sans terre.

An office annexed to land was called in Normandy “*Sergenterie glebée*” (c). A serjeanty, consisting of the right of appointing to or of exercising a public office, and held by feudal tenure, in gross, was called “*dignité*,” or “*franchise*,” and was classed with rights of warren, market, mulcture, “*ou aucunes telles choses qui sont tenues de seigneurs, sans fons de terre*” (d).

(a) *Qu. Denum, ante, 207.*

(b) *i. e.* of the present king as heir to Hen. III.

(c) *Ante, 297.*

(d) *Terrien, Comment. 175.*

"Because the issues coming from that serjeanty, which Simon of the Exchequer, lately deceased, had in the said Exchequer, are uncertain (in incerto), wherefore the king cannot assign to Petronilla, who was the wife of the said Simon, dower in anything certain thereof, nor ought a division of such a serjeanty to be made, nor has it hitherto been made in the said Exchequer, the king commands the barons, that deducting the reasonable costs and expenses of the ministers attending to the office of the said serjeanty, which by the said ministers would happen to be made, they cause without delay to be assigned to the said Petronilla, the third part arising of the said issues of the said serjeanty in the Exchequer aforesaid, according to the discretion of the barons, for her dower belonging to her of the issues of the said serjeanty; salvo jure cujuslibet (a)."

Appendix.
Partition of
issues of an in-
divisible ser-
jeanty.

"Although the king lately appointed a day for Matilda, one of the sisters of Simon of the Exchequer, and to William Payforer and Lowe, his wife, his other sister, and heirs of the said Simon deceased, who held of the king in chief, to appear before the king, to receive the purparty belonging to them of the serjeanty, which the said Simon held in the Exchequer on the day in which he died, the king, however, wills, that the said partition, inasmuch as it touches the said Exchequer, be made in the Exchequer, by the consideration of the barons. The king commands the barons that at a certain day, to be by them provided in that behalf, they cause the parties aforesaid to come before them at the Exchequer, and to cause justice to be done to them in the assignment of the serjeanty aforesaid, with the appurtenances according to the law and custom of the said Exchequer, as before in such cases has been wont to be done, and that that assignment, when it shall have been made, they send to the king under the seal of the said Exchequer, that the king may cause the same to be enrolled in the Rolls of Chancery. Teste Rege (b)."

"Memorandum—That Andrew Billisbie of the county of Lincoln holds, by hereditary right, the office of Usher of the Exchequer of our lord the king, with divers other offices thereto belonging, viz. offices of ushers and criers in C. B., marshals, ushers, criers, and bariariorum (qu. bar-keepers) in each of the eyres of the justices itinerant within the kingdom of England, and fivepence to be received every day in the receipt of the Exchequer aforesaid, in the said office of usher of the Exchequer

Ushery of the
Exchequer.

(a) Mem. in Scacc. P. 20 Edw. I. Maynard, 19.

(b) Ib. 20. *Vide ante*, 295.

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of our lord the king by grand serjeanty, and it is worth annually twenty marks above reprises. And this appears in the records of the Exchequer of the times of Edw. III., Hen. IV., Hen. VI. and Edw. IV. (a)."

In the following case, the office and the land were disannexed for years only, so that the appendancy was not destroyed, but suspended.

Serjeants of the king's chapel.

"John Boun, knight, son of Lord Prancon Bohun and Joan, wife of the said John, grant to the king their serjeanty of the chapel of the said king, and the office of Spigurnells to them belonging (b), which they hold of the king in chief, habendum for two years, saving the lands belonging to the said serjeanty." Mem. in Scacc. M. 14 Edw. I. Mayn. 14.

Lord High Constable.

The Bohuns held the manors of Harlefield (c) Newnam and Whitenhurst, in Gloucestershire, by the serjeanty of the office of constableness of England (d).

(a) Dyer, 213 b. It would appear, however, that the ushery of the Exchequer was not originally held in gross. See Calend. Inq. post mortem, 83 b. And see ib. 36 a, 108 b; 1 Rot. Parl. 426 b, 474 b; ante, 179.

(b) This serjeanty was also granted to Edw. I. in an earlier part of his reign. "Noverit universitas vestra nos unanimi assensu concessisse et remisisse Edwardo regi Anglie serjantiam capelle sue et officium spigurnellorum dicti domini Regis."—Rymer, ii. 49, anno 1275, 4 Edw. I.

(c) Called Haresfield, Calend. Inq. post mortem, i. 108.

(d) Co. Litt. 106 a. Upon the death of Humphrey Bohun, Earl of Hereford, these manors descended upon his two daughters Elinor, the wife of Thomas of Woodstock, Duke of Gloucester, and Mary, wife of Henry IV. A partition was made between Henry V. as eldest son and heir of Mary, and Anne (afterwards Countess of Stafford) as only daughter and heir of Elinor; by which Harlefield was allotted to the king, and Newnam and Whitenhurst to Anne. Upon the extinction of the descendants of Mary, the Duke of Buckingham, son of Anne, claimed Harlefield, which, after the partition, had been annexed to the crown by act of parliament. Humphrey Stafford, Duke of Buckingham, was, by a promise that he should be put into possession of the entire serjeanty, induced to assist Richard III. in his usurpation of the throne. Upon the nonperformance of that promise, Buckingham engaged in an unsuccessful attempt to dethrone Richard, and lost his life on the scaffold. His great grandson Edward, Duke of Buckingham, in M. 6 H. VIII. (1514) sued to be restored to the office of constable; when it was after much debate resolved—First, that upon a feoffment of the manors the office might be reserved (as an office in gross). Secondly, that upon the descent of the serjeanty upon the two daughters they were to appoint a deputy to perform the duties of the office. The third and most *diffuse* question, viz. whether by the vesting of one of the manors of the king, the office was determined, was decided in the negative.—Keilwey, 170, pl. 5.

"Cum Humfridus Comes Hereford et Essex dederit Humfrido de Boun, nepoti suo, constabulariam Anglie, prout in literis suis inde Regi directis patet, et

Upon the marriage of Blanch, eldest daughter of Henry IV., to her first husband, the Elector Palatine (a), writs were sent to the sheriffs, escheators, and the collectors of the aid of 20s., to be paid from every knight's fee on that occasion, sending to them, for their guidance in taking inquiries, certain evidence from the Red Book of the Exchequer and Rolls, containing the amounts paid when the king's uncle, the Black Prince, was made a knight. After enumerating the knight's fees, the "Seriantes" are mentioned. These were persons holding by grand serjeanty, as appears by the nature of the service and by the liability (b) to aid.

Appendix.
Aid pur file
marier.

"Petrus filius Ogeri 40 cabulion (qu. ?) per unam capam (c) de Gresenge (d) in adventum dicti domini Regis in Cornubiam.

"Rogerus Cithared pro portanda illa capa dum Rex fuerit in Cornubia," &c. (e).

Lord Coke says, that it is a tenancy by grand serjeanty to hold lands by any office concerning the administration of justice; and that Varianus de Sancto Petro tenuit de domino Rege medietatem serjantiæ pacis, per servicium inveniendi decem servientes pacis ad custodiendum pacem in Cestriā; for which he vouches an inquisition on the death of V. de Sancto Petro, 4 Edw. II. Cestr. (f). In Calend. Inquis. post Mortem, i. 123, 133, 143, it is stated that Urianus de Sancto Petro died seised of the custodia pacis in Chester (g). And see *ibid.* 101 a, an entry which probably relates to the other moiety of the manor.

Serjeanty of the
peace.

Amongst the possessions of Edmund Earl of Lancaster, the king's brother, we find in the inquisition taken 25 Edw. I., that he died seised "de magna serjantia tocius comitatus de Derby" (h).

Rex cepit homagium ipsius Henrici de constabularia predicta, et eidem Henrico eandem reddidit, salvo jure suo; Ideo Rex mandat Baronibus quod, accepta securitate a prefato Henrico, de rationabili relevio suo reddendo ad Scaccarium, eundem admittant ad constabulariam predictam, tenendam sicut predictus comes tenuit &c."—Mem. in Scacc. 4 Edw. I. Mayn. 4.

(a) P. 3 H. IV. fo. 16, pl. 11.

(b) 1 Rot. Parl. 214 a.

(c) "Et fracta est cappa Regis Anglorum ex percussione Will. de Barres."—Roger Hoveden, in Rich. I. And see Ducange in verbo.

(d) Grisengus pannus, grey cloth, occurs in Legibus Ethelredi Regis, cap. 23, and in Monastic. Anglic. i. 831. And see Ducange.

(e) Carew, Survey of Cornwall, 49.

(f) Co. Litt. 106 a; 1 Tho. Co. Litt. 380; and see *ante*, 224, 290; 1 Rot. Parl. 51 a.

(g) And as to the office of serjeant at law in the county of Chester, see Rot. Parl. i. 392 b, vi. 364 a, 366 a, 378 a, whereby it appears that the serjeants of law of that county were appointed by letters-patent (*post*, 304), with a fee formerly of two marks with robes, afterwards of five marks, 3*l.* 6*s.* 8*d.* per annum.

(h) Calend. Inquis. post mortem, 136 b.

No. LXXVI.

*Serjeant-Pleaders in Ireland.**Ordinatio facta pro statu Hibernie, (1302,) 31 Edw. I. st. 4.*

Against cham-
perty of ser-
jeant-pleaders
in Ireland.

Cap. X. Item cum quidam ministri tam majores quam minores, *ac servientes in curiis Nostris ibidem placitantes*, et quandoque clerici Placearum (a), non obstantibus statutis de cambipartiis editis, tam propter munera et pacta quam mutuas conventiones inter ipsos et quosdam partium *coram* eis placitancium de terris placitata, cum recuperate (b) fuerint habend. alteram partem, manutenerint, defenderint et juverint; ita quod terra hujusmodi placitata, et per manutentionem et defensionem ministrorum et *servientum* predictorum, errante justitia, recuperata, penes aliquem eorum, nichil proinde (c) solvendo, vel modicum, remanebat, sicque partes terra sua fraudate, factisque expensis circa ipsa placita perditis, ad (d) paupertatem vel statum miserum ducebantur; volumus et precipimus, et sub gravi forisfactura Nostra, et sub penis etiam in dictis statutis contentis, districtius inhibemus, ne qui ministri Nostri majores vel minores, *servientes* aut clerici quicunque hujusmodi manutenencias, defensiones seu auxilia, partibus, hiis occasionibus, contra justitiam faciant vel impendant, nec hujusmodi terram placitatum sic adquirant, nec (e) quicquam aliud attemptent contra formam statutorum eorundem.

Modern Irish
serjeants.

At present the course in Ireland is, for the crown to promote three barristers to the rank of serjeants. They take precedence of all king's counsel, except the attorney and solicitor-general. It is a patent office (f), to which a small salary (f) is attached. In a petition by the liege people of Ireland, 14 Edw. II. (1320); it is prayed, that inasmuch as the law is badly kept for want of wise justices, the king order that in his Common Bench, there be men knowing the law. The king directed inquiry to be made by the treasurer of Ireland (g).

In 1 Hen. V. (1413); Irishmen were banished from England, except, inter alios, serjeants and apprentices at law (h).

(a) The two Benches.

(b) In Ruffhead; Appendix 40, printed "recuperare."

(c) In Ruffh. "provide."

(d) In Ruffh. "ac."

(e) In Ruffh. "ne."

(f) So in Chester, ante, 303.

(g) Rot. Parl. i. 386.

(h) Ib. iv. 13.

No. LXXVI.

Extent of the Royal Prerogative in creating New Peers and New Boroughs, as asserted in a Speech delivered by the King in the Council Chamber, Whitehall (a), 12 Jac. I. (1614), in answer to a Remonstrance from the Lords of the Pale in Ireland, praying "that his Majesty would not give way to courses so hard and exorbitant as to erect Towns and Corporations of Places consisting of some few and beggarly Cottages."

"As to the complaint of the new boroughs therein, I would fain feel their pulse, for yet I find not where the shoe wrings; for, first, they question my powers, whether I could lawfully make them, and then the wisdom of myself and my council, in that they say, there are too many made. It was never before heard that any good subjects did dispute the king's power in this point. What is it to you, whether I make many or few boroughs? My council may consider the fitness, if I require it. But what if I created forty noblemen (b), and four hundred boroughs? The more the merrier; the fewer the better cheer."

Royal prerogative in creating peerages and boroughs.

No. LXXVII.

Letter (c) from Stephen Gardner, Bishop of Winchester, to the Duke of Somerset, Protector to Edw. VI.

"Now, whether the king may command against an act of parliament, and what danger they fall in that break a law with the king's consent, I dare say no man alive at this day hath had more experience in the judges and lawyers than I. First, I had experience with my old master the Cardinal (d), who obtained his legacy (e), by our sovereign lord's (f) request, at Rome; and in his sight and knowledge occupied the same, with his two crosses and maces borne before him, many years. Yet, because it was against the laws of the realm, the judges concluded it the offence of the premunire; which conclusion I bear away, and take it for a law of the realm, because the lawyers so

Danger of breaking laws with the king's consent.

(a) Southwell Papers, British Museum.

(b) *Ante*, 179.

(c) Apud Fox, vol. ii. Petyt, *Jus Parliam.* 200.

(d) Wolsey.

(e) Legatine authority.

(f) Henry VIII.

Appendix.

Judges' oath
not to stay pro-
ceedings.

Magna charta.

Royal procla-
mation.

said; but my reason digested it not. The lawyers, for confirmation of their doings, brought in a case of the Lord Tiptoft, as I remember, a jolly civilian. He was chancellor to the king, who, because, in the execution of the king's commission, he had offended the laws of the realm, suffered on Tower Hill (a). They brought in examples of many judges that had fines set on their heads, in like case, for doing against the law of the realm by the king's commandment: and then was brought in the judges' oath (b), *not to stay any process or judgment for any commandment from the king's majesty*.

And one article against my lord cardinal was, that he had granted injunctions to stay the common law. And upon that occasion Magna Charta was spoken of. And it was made a great matter, the stay of the common law. And this I learned in that case.

Sithence that time, being of the council, when many proclamations were devised against the carriers out of corn, at such a time as the transgressors should be punished, the judges would answer, "it might not be by the laws." Whereupon ensued the act of proclamation (c). In the passing of which act many liberal words were spoken, and a plain proviso,—“That by the authority of the act of proclamation, nothing shall be made contrary to an act of parliament or common law.”

No. LXXVIII.

Refusal of the Judges of the Court of Common Pleas to obey the command of Queen Elizabeth to admit Richard Cavendish to a new Office in that Court (d).

Queen's
verbal message.

R. Cavendish suggested to Her Majesty, that it was in her power to erect an office for making out all writs of supersedeas quia improvide emanavit, in the Common Pleas. Whereupon the queen, by her letters patent, granted office to make out such writs, to Cavendish, for divers years. And the judges were commanded, verbally, by a messenger to admit him, which they did not do. Upon which, Cavendish procured a letter (e) to be

(a) Qu. whether Sir John Tiptot.

(b) *Ante*, 311.

(c) 31 Hen. VIII. c. 8; and see 34 Hen. VIII. c. 13, and 1 Edw. VI. c. 12, which repealed both.

(d) 1 And. 152; Petyt, *Jus Parliam.* 203.

(e) This is set out by Anderson, but not by Petyt.

directed to the judges under the sign manual and signet, wherein, taking notice that they had not complied with the message that she had sent to them before, she further commanded them, that they should forthwith sequester the profits of the said office that had grown due since her grant, and that should grow due till the controversy for the execution of the said office should be decided, &c.

Appendix.

Queen's first letter.

The letter being delivered to the judges, and being considered of by them, their opinion was, that they could not lawfully act according to the contents of this letter and command, because others, who then pretended a right to make out the said writs, might by such sequestration be disseised of their freehold, which they claimed in the making of such writs, and in the fees due for the same, for which reason no sequestration was made.

Judges' opinion.

The Queen being informed of the 'judges' resolutions by Cavendish's great friends, another letter was procured from her, under the signet and sign manual, directed to the said judges.

"Trusty and well beloved, We greet you well: Whereas We granted to Our trusty and well beloved servant, Richard Cavendish, Esq., by Our letters patent under Our Great Seal of England, the making and writing of all supersedeases upon exigent, issuing out of Our Court of Common Pleas, and have divers times sent unto you for his admittance into the said office, as well by message delivered by persons near about Us as otherwise; which, nevertheless, hath been neglected: In consideration whereof, We, for that Our said servant was to depart into the Low Countries for a season, gave a commandment for the sequestration of the profits of the said office, until Our further pleasure therein should be declared. Wherefore, for that We look for some more dutiful regard to be had by you of Our prerogative royal, We have thought good to signify unto you Our further pleasure in this behalf: Which is, that Our said servant be no longer withholden from the benefit and use of Our said grant. And these are therefore to will and command you, and every of you, that immediately upon the sight hereof, without any further delay, you cause present payment to be made unto him, or to his assignee, of all the aforesaid profit since the day of Our said grant, upon bond, with condition, that if from the time of his admission into the said office, he, his deputy or deputies shall, by virtue of Our said grant, hold and enjoy the same, without lawful eviction or recovery thereof out of the hands of him or his deputy or deputies, by any other

Queen's second letter.

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pretending title to the making and writing of the said writs, then the said bond to be void, &c. And furthermore, Our will and pleasure is, and therefore We will and command you, that upon Our said servant's offering of himself unto you in Our said Court this next term, you presently, without any further delay, admit him unto the use, execution and profits of the said office, according to Our said grant. For that We be nothing ignorant, that if any of your clerks have any such title or interest as they pretend, both Our laws lie open for their remedy (a), and also they be persons, both for wealth and skill, able to recover their own right, if any such be. In consideration whereof, We look that you and every of you should dutifully fulfil Our commandment herein; and these Our letters shall be your warrant. Given under, &c. 21 April, 1587. Anno 29 Eliz."

This letter being delivered to the judges, in the presence of the Lord Chancellor (b) and the Earl of Leicester, in the beginning of Easter Term, 29 Eliz., the Chancellor declared to the judges, that the Queen had granted that patent to Cavendish out of the great desire she had to provide for his advancement, and which she intended he should by that means enjoy; and therefore had commanded himself and the said earl to hear the judges' answer to the contents of that letter.

Further
deliberation of
judges.

Judges'
answer.

Answer
reported to the
Queen.

Queen's
serjeant's
argument.

Whereupon the judges took the letter, and desired a little time to consider of it; and that being allowed them, they perused it, and forthwith went back to the said lords and delivered their answer,—That they were willing in all lawful points to obey her Majesty, dutifully, and in humble manner; but that, as that case was, they could not obey her without being perjured (b), which, as they said, they well knew that the Queen (if she were informed of it) would not command or require of them. Whereupon they departed, and their answer was reported to the Queen, who then commanded the Chancellor, the chief justices of the King's Bench, and the Master of the Rolls, to hear the judges' reasons, and what the causes were that moved them to give such an answer; and also what they had to say against the Queen's prerogative and right in that matter. And the Queen's learned counsel was likewise commanded to attend; who being all assembled, the Queen's serjeant shewed that the Queen had a right and prerogative to grant the making out of these writs, and shewed precedents of making writs of subpoena, and of the office of curia, erected by means of Sir Nicholas Bacon; late

(a) *Vide ante*, 227, 229.

(b) *Ante*, 211.

Keeper of the Great Seal, and of an office in the King's Bench, and furnished his discourse with such reasons and arguments as he had, to prove that the Queen might grant this pretended office.

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To which the judges, protesting that they to the utmost of their power, would help the Queen in all her rights, whereunto they were bound, not only by common duty, but by oath, which rights they wished might be maintained and preserved, for answer said, that this proceeding was extra-judicial, and hors del cours de justice; and for that cause they would make no answer to what the Queen's Serjeant had said. But, as for themselves, they claimed no advantages by the said writs, but the prothonotaries and divers exigenters of the court did. For these officers claimed a *frechold* during their lives in the profits of such writs; and therefore they, according to law and reason, ought to be brought to answer, and not the judges. After all which the letters above mentioned were produced, and the judges were charged for not having obeyed the Queen's command therein contained.

Judges' answer.

To that they said, they must confess they had not fulfilled the Queen's command, but this they said was no offence or contempt against Her Majesty, because the commands were against the law of the land; in which case no man is bound to obey such command, and in justification hereof they offered to shew precedents of former times.

At which the Chancellor, Master of the Rolls, and the rest, seeming to be somewhat surprised, the judges were forced to shew their reasons of their answer; who thereupon said,

First, that the Queen herself had taken an oath that she herself would keep and observe the laws. Secondly, that the judges had sworn to do the like. Thirdly, that for what concerned the judges, if they should obey those commands, they would act otherwise than the said laws warranted, and go directly contrary to them, which would be against their oath, and consequently an offence against God, the country, and commonwealth, in which they were born and lived. Fourthly, that if they had thrown off all fear of God, yet the examples of others, and the punishments of such as had theretofore offended against the laws, would be sufficient to put them in mind, and to restrain them from being guilty of the like.

Judges' reasons.
Queen's oath.
Judges' oath.
Duty of judges.

They then referred to the cases of Hugh le Despenser, temp. Edw. II. (a); W. de Thorpe, temp. Edw. III. (b); Tresilian

Danger to judges.

Precedents referred to by judges.

(a) Petyt, Jus Parl. 207.

(b) Ibid. 207.

- Appendix.* and the other judges, temp. Rich. II. (a); and Empson and Dudley, temp. Hen. VIII. (b).
- Statutes.* After which were cited Magna Charta, c. 20; 5 Edw. III. c. 9, and 28 Edw. III. c. 3, which provides, "That no man, of what estate or condition soever he be, shall be ousted of his lands or tenements, or kept in prison, or disinherited or put to death, without being put to answer by due process of law." Also 11 Rich. II. c. 10 (a). By which laws the office and duty of judges and of all others appears; and that by the above cited precedents it was evident how great an offence it is voluntarily to break the laws of the land, which all of what degree soever are prohibited to do. For which causes, and because the Queen and the judges were sworn, they said they would not do according to the said letters.
- Ultimate acquiescence of the Queen.* All which was reported by the Lord Chancellor to the Queen, with her good approbation of the matters aforesaid, and of the reasons alleged, which I (c) have heard her Majesty well accepted of. But no more was done in it; nor did the judges hear further of it that Easter Term, nor in Trinity Term, which moves the judges to think no more will be done in it (d).

NO. LXXIX.

Petition in Parliament that Suitors in Courts of Franchises and other Jurisdictions may be heard by such Counsel as they may deem it advisable to bring with them.

By a petition in parliament in 1433, after reciting that in courts in franchises and in other lower courts (en courtees en franchises et en autres courts pluis bas) plaintiffs and defendants bring with them a man whom they consider wise and profitable for them, to be of their counsel to count and answer for them in law upon matters by them or against them depending in such courts, the stewards and judges in the said courts, often either for affection or love, which they have more for one party pleading before them than for the other, or for great enmity which they have to their said counsel, will not suffer or receive their

(a) Petyt, Jus Parl. 182.

(b) Ibid. 207; 1 Anders. 156.

(c) The reporter, Anderson, C. J.

(d) Que pluis ne voile estre. 1 And. 152.

said counsel to count or answer in the law for them (a) ; whereby sometimes the plaintiff and sometimes the defendant have been put to great loss, and some have wrongfully been condemned in great sums, and others have utterly lost their matters depending in the said courts ; the commons pray the king and the lords, that the king will be pleased, by the authority of the present parliament, to ordain and establish, that every man, impleading or impleaded, may bring with him such counsel as seems to him good and profitable, to plead and answer for him according to what the laws and usages of this realm demand, and that the stewards and judges of such courts may receive such to plead and answer for them, unless the persons whom they have brought to be of their counsel be before convicted of any such trespass or thing that they ought not by the law of the land to be received thereto ; and that if any such judge do to the contrary, the party damnified may recover his damages against him, according as the grievance may demand.

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ANSWER.—It is sufficiently provided by the common law (b).

No. LXXX.

All the Justices and Serjeants of England consulted by the Court of Exchequer.

Memorandum. That in the Exchequer Chamber at Westminster, in the presence of all the Justices and Serjeants of England, and of all the Barons of the said Exchequer, assembled for the same cause, Blage, one of the Barons of the said Exchequer, shewed and moved a question depending before the said Barons, upon the king's general pardon, made by authority of parliament in the seventh year of his reign,—M. 8 Hen. VIII. (c).

(a) *Vide ante*, 124, 125.

(b) 4 Rot. Parl. 449.

(c) Keilw. 186 b.

No. LXXXI.

Apprentices at Law commanded in Parliament (a) no longer to delay obeying the King's Writ calling them to be Serjeants, on account of the inconvenience which had been experienced by suitors in the King's Courts, by reason of the smallness of the number of Serjeants (b).

Be it known, that whereas upon great complaint made to our sovereign lord the king, for that the people of the realm in their suits, matters, and causes, depending in his courts, had not their business so well dispatched (c) as they used to have, by reason of there being so small a number of serjeants of the law, to the very great mischief and 'damâge' of his people (d); our said sovereign lord, willing to remove (e) such mischiefs and damage, by advice of his council, caused to be called, a long time since, certain apprentices of the law, and caused them strictly to be enjoined to take the estate of serjeant, for the ease and safety of all those who had business in his said courts, to wit, William Babington, John Martyn (f), William Pole, William Westbury, John Juyn (g), Thomas Rolfe (h): nevertheless they have not put the same into execution, as the honourable and puissant prince, the Duke of Bedford (i), the king's lieutenant, has, by true information, now understood; the same lieutenant, having taken the whole into his consideration, by the assent of the lords spiritual and temporal assembled in this present parliament, caused to come before them there in parliament, the 22d day of November, which was the eighth day of the said parliament, the said apprentices, and enjoined them in the king's name (k), by great penalties (l), to haste themselves to the taking of such estate without any delay: and afterwards, to wit, on the 5th day of December, which was the twentieth day of the said parliament, came there some apprentices before the said lieutenant

(a) 5 H. V. (1417), 4 Rot. Parl. 107 b.

(b) Intituled. " L'assurance de ceux q'ont nomez d'estre serjantz de la ley." And see *ante*, 35.

(c) N'eussent si bone exploit.

(d) *Vide ante*, 180.

(e) Voillant buster.

(f) *Ante*, 35, 200.

(g) *Vide ante*, 35.

(h) *Vide ante*, 35.

(i) John of Lancaster, afterwards Regent of France.

(k) De par le roy. The same form is used, *ante*, 244.

(l) The penalty was originally 100*l.*, *vide ante*, 201. It was afterwards raised to 1000*l.*, *ante*, 200. Whether it was raised to the latter amount on this occasion does not appear.

and lords in parliament, and prayed, of grace, that they might be respited in that behalf until the term of the Holy Trinity next coming, and promised and assured to perform it at that time without further delay or excuse whatsoever. Whereupon good deliberation being had upon certain causes and matters by these same apprentices before them shown and declared, the said lieutenant, with the assent aforesaid, admitted and granted it as they desired, so that they should stand at the king's grace if they did not perform it as they had promised and assured.

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No. LXXXII

Bill for opening the Court of Common Pleas

18 June, 1839.]—Lord Cottenham C. presented in the House of Lords the following "Bill to regulate the course of proceeding in the Court of Common Pleas, so far as relates to the practice and hearing of counsel therein in term time" (a).

Whereas it is expedient to regulate the course of proceeding in her majesty's Court of Common Pleas at Westminster, so far as relates to the exclusive privilege of serjeants at law to practise and to be heard therein during term time (b): Be it therefore enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act, in all motions already pending or which shall be made in the said Court, touching the trial of any cause or issue which has been or shall have been tried at the assizes holden for any county, city, or place, other than London or Middlesex by virtue of any writ of nisi prius; and also in all such motions touching the execution of any writ of inquiry before any judge at the assises in the country; and also upon all such motions touching the execution of any writ of inquiry directed to any sheriff or sheriffs of any county, city, or place whatever, or any writ of trial (c) directed to any such sheriff or sheriffs, or to any judge of an inferior Court of Record, it shall be lawful for any

In what cases barristers to exercise equal rights with serjeants at law.

(a) Mirror of Parl. 3042.

(b) In the bill as amended and passed in the House of Lords, the words "whilst the same court is sitting in bank" were substituted for the words "during term time."

(c) Under 3 & 4 Will. IV. c. 42.

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Business pending to be concluded as if act had not passed.

Extent of privileges under this act.

barrister or barristers at law, not being of the degree of the coif, who was or were actually engaged or concerned and present on the occasion of such trial or inquiry, according to their respective ranks and seniority, to have and exercise equal right and privilege of practice, pleading, and audience in the said Court of Common Pleas with the serjeants at law, in term time(a) as well in respect of making and supporting as of opposing such motions as are hereinbefore mentioned: Provided always, that nothing herein contained shall prevent any such barrister or barristers at law from carrying on and bringing to a conclusion any other matter of law or business pending in the said Court of Common Pleas, in which he or they were already engaged at the time of passing this act, in the same manner as if this act had not been passed(b): Provided also, that nothing herein contained shall be construed to extend to the opening of(c) the said Court of Common Pleas to the practice therein by barristers at law, not being of the degree of the coif, in any other manner or to any other extent than is herein-before specified and contained (d).

21 June, 1839.]—On moving the second reading of this bill, the Lord Chancellor said, "According to a very antient practice of the Court of Common Pleas, serjeants have an exclusive privilege to act in that Court. Now the object of the present bill is, to modify the existing regulations respecting that exclusive privilege in conformity with the Report of the commissioners in 1829 (e); and I certainly think that this proposition is calculated to receive your lordships approbation."

Lord Wynford said, "I for one certainly very much approve of the alteration which is proposed to be made by this bill; and without dwelling on its merits, I beg to express my hopes that it will meet with the concurrence of your lordships."

The bill was then read a second time, and committed to a committee of the whole House on Monday next (f).

24 June 1839.]—House (of Lords) in committee, according

(a) In the amended bill, "whilst the said court is sitting in bank," instead of the words "in term time."

(b) This would rather imply that they had the power of pleading in the Court of Common Pleas *de jure* as well as *de facto*, at the time the bill passed.

(c) In the amended bill, "And be it further enacted, that nothing contained in this act, or in any warrant from the crown, or any order of the said court in that respect heretofore made, shall have the force or power of opening," instead of the preceding words of the proviso.

(d) In the amended bill "mentioned."

(e) *Ante*, 20, 21.

(f) *Mirror of Parl.* 3210.

to order. An amendment made,—the report thereof to be received to-morrow (a), *Appendix.*

1 July, 183 .]—The Lord Chancellor having moved the third reading of this bill,

Lord Langdale said, “ The practice in the Court of Common Pleas being formerly confined to serjeants, was by an order issued five years ago opened to all barristers. The bill now before the House proposes to open it only partially, by confining the power of moving for new trials to causes tried on the circuit, and excluding those heard in London and Middlesex. As the greater number of causes tried by the Common Pleas are in the latter division, of course barristers are shut out in a proportionate degree. I think then it would be more conducive to the public service if the act were more extended in its operation (b). As this bill is, however, brought in for the purpose, as I understand, of reconciling differences, and as it is in all probability well considered, I shall not further oppose it.”

The Lord Chancellor. “ The reason that this privilege is confined to the circuit is, because the serjeants do not always (c) go there, whereas they are always to be found in London and Middlesex.”

The bill was then read a third time and passed, and sent to the Commons (d).

(a) *Mirror of Parl.* 3255.

(b) A more extensive operation might have been given to the bill by omitting the words in italics. But in this case the business confined exclusively to the serjeants would have consisted of little more than the minor interlocutory matters in a cause. This would have deprived the Court of Common Pleas of the advantage of a permanent bar; for if the most important business of the Court was to be in the hands of barristers, it would be unreasonable to restrict the practice of the serjeants to their own court. Besides which, few persons, if any, would, for the sake of mere rank, without any exclusive or peculiar rights, willingly incur the expense of taking the coif.

(c) The reporter has here omitted the word “ always,” representing the chancellor as denying that the serjeants are ever to be found on the circuit, and therefore evidently misunderstanding the noble and learned lord, who no doubt merely stated that the assistance of serjeants was not always to be procured on the circuit, especially on each side.

(d) *Mirror of Parl.* 3493.

No. LXXXIII.

Speech of Mr. Serjt. Wilde(a), 2 Nov. 1839, on moving that the antient Practice of the Court of Common Pleas with respect to the exclusive right of audience, enjoyed in that Court by the Serjeants at Law might be restored.

At the sitting of the Court on the first day of Michaelmas term, upon *Findal*, C. J., calling upon Wilde, Serjt., to move, the learned serjeant addressed the Court as follows:—

On behalf of my learned brothers Taddy, Spankie, Atcherly, Merewether, and myself(b), I have to call your lordships' attention to the departure which has recently taken place from the antient course and practice of this Court, and the violation, as I conceive, of the constitution of the Court itself. Your lordships will have anticipated that I refer to that course which has lately obtained of other gentlemen of the bar being allowed to practise in this Court, in common with the serjeants. My learned brothers and myself feel that the present is the fittest moment to call the attention of your lordships to the subject, and most respectfully, but most earnestly, to protest in the name of the constitution and of the law, against that course of practice being persevered in.

In the year 1834 a warrant(c), under the sign manual of the crown, was sent to the judges of this Court, commanding them to open it to the members of the bar generally. Until the very morning on which that warrant was read in Court, the serjeants were ignorant of its contents or form. They had received no intimation on the subject, and although they were aware that some measure of the sort was in contemplation, they were wholly ignorant of the form and of the terms in which it was to be effected until they heard the warrant itself read in Court. Your lordships, upon receiving the royal mandate, thought at the moment, without bestowing further consideration upon the subject, that you were bound to obey it; and, accordingly, you ordered it to be recorded, and proceeded to call upon the other gentlemen of the bar to move. The serjeants, however, entertained at the time a strong opinion that the warrant was illegal, and that any interference on the part of the crown with the antient and established practice of the Court was an unconstitutional exercise of the pre-

(a) Appointed Solicitor-General in December, 1839.

(b) The five Queen's Serjeants who had petitioned the crown, as *ante*, 1—5.

(c) *Ante*, 2.

rogative, but they deemed it respectful and proper to forbear to interfere until they should thoroughly have satisfied their minds on the subject. They were, moreover, ignorant as to how far the judges of this Court had countenanced, or had sanctioned, or were parties to the measure. In short, the document came by surprise upon the bar of this Court, and therefore they forbore on the instant to interfere on the subject, notwithstanding their strong opinion of its illegality. In the year 1755.(a), when one of the learned judges (b), then on the bench, had suggested the expediency of the Court's being opened to general practitioners, no one dreamed that it could be done except by authority of parliament. For that purpose a bill was prepared to be introduced into parliament, thereby showing the opinion which then prevailed, that it required a legislative enactment to alter the established practice of the Court. The bill was afterwards abandoned upon consideration by the judges of the public interest and convenience, and the conclusion came to by them that that interest and that convenience did not require the projected measure. When the bill for establishing the Central Criminal Court (c) was before the House of Lords, it contained a clause for opening this Court. That clause was afterwards struck out, but the introduction of the clause into a bill furnished an additional proof of the conviction which prevailed, that the authority of the legislature was necessary to effect any change in the constitution and practice of the Court. So recent a recognition of the constitution of the principle that the constitution of this Court was liable to be altered by the authority of parliament, precluded all anticipation that a mere warrant under the sign manual should be thought sufficient to effect that most important object. We could not but think that your lordships were taken equally by surprise by the production of that document, and that you were placed in the dilemma, of either hesitating to act on a communication from the crown, which might be supposed by your lordships to have been the result of great deliberation and advice, or of acting without having had an opportunity of forming your own judgment respecting its legal validity. Your lordships, accrediting that document at the moment, acted upon it, directed it to be read in Court, ordered it to be recorded, and called upon gentlemen of the bar to act as advocates in this Court, which, from that time, they have continued to do.

The serjeants had to consider whether that warrant was a

(a) *Ante*, 11.

(b) Willes, C. J.

(c) *Ante*, 175.

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legal document. Besides which, my four learned brothers, for whom I appear, and myself, held patents from the crown; we were officers of the crown, and owed the utmost respect and obedience, connected with the law, to the crown. We had to consider the legality of an attempt so to exercise the prerogative, and to ascertain the most respectful and proper mode of communicating to the crown the impressions which we humbly entertained as to the validity of the instrument in question. My brother Taddy, in a subsequent term, intimated to the Court his intention of calling your lordships' attention to the validity of that document. Upon further consideration it was deemed right to present a memorial to the crown, not praying relief, not praying the recal of that document, but respectfully stating that we apprehended it to be illegal, and praying that the crown take advice as to the legality and expediency of that document, so that at a future day we might appeal to your lordships,—the only constitutional tribunal to which such an appeal can be made. The crown was pleased to refer the memorial to the judicial committee of the Privy Council, before whom the subject underwent an elaborate discussion; three of the learned judges whom I have now the honour of addressing were present during that discussion. There was also present another member of this Court, whose recent loss is deeply lamented as a bitter calamity by all who, like me, have lost in him a valuable and affectionate friend.

The crown condescended, in answer to the prayer of that memorial, to cause the Attorney and Solicitor-General to attend the Privy Council for the purpose of assisting its deliberations, and of maintaining the just prerogative of the crown, but of course with a higher object—that the law and constitution should have its regular and legal course. During the whole of the two days that this discussion lasted, not one suggestion, not one authority, not one observation could be offered in support of the legality of that warrant. The law officers of the crown, in express terms, taking credit for their sincerity and candour in so doing, stated that they apprehended that the matter rested with the judges of this Court, and that they alone had the power of regulating the practice of the Court. The Attorney-General acknowledged (and he stated that he felt bound to make that acknowledgment), that he had great difficulty in saying that the warrant was binding or could be supported. The Attorney-General (a) admitted (b) that he could find no precedent to support

(a) Sir John Campbell.

(b) *Ante*, 119.

that warrant. The Solicitor-General (a) expressed himself to the same effect (b). One of the learned lords present upon that occasion, stated his opinion, which was in no respect controverted by any other member of the Court—Lord Abinger said, “I must own that at the time I formed an opinion, that it was a very illegal proceeding to take away the exclusive privilege of the antient practitioners of a Court of Justice (c).”

The crown, therefore, by its legal officers having abandoned the legality of that warrant, as a document giving any authority to this Court to take away the antient privilege of the serjeants, or to alter the very constitution of the Court, the discussion proceeded upon various other matters, wholly independent of the legality of the warrant.

A day was appointed (d) for the Lords of the Council to take such course as they should think fit in respect to the matter. Upon our humble application that we should be allowed to attend on that day, we were informed that the Court had adjourned sine die. We had prayed for no act to be done, on the part of the crown. We had merely requested that the crown would condescend to do that, which it graciously did, take steps to inform itself of the legality of that exercise of prerogative, which had been set up, and which was thus abandoned at that council by its law officers.

Having therefore discharged that duty of respect to the crown which we, as officers of the crown, felt that we owed, nothing remained but to come to this Court to recall your lordships' attention to the matter, and to pray that the law might take its course, and that the common law might be observed in conformity with the statutes (e) and with your lordships' oaths.

We were aware that some time having passed,—gentlemen having become concerned in causes which were then pending, a return to the antient legal and constitutional course might be attended with some temporary inconvenience, and we, therefore, forbore, upon requests to which we were bound to yield the most respectful obedience, in order to give the legislature an opportunity of interfering, either by opening the Court altogether, or partially to such an extent as it might be deemed wise, if such a notion should be entertained, or to give any temporary liberty which might be considered expedient in respect to the

(a) Sir Robert M. Rolfe, now one of the barons of the Exchequer.

(b) *Ante*, 147.

(c) *Ante*, 154.

(d) *Ante*, 168.

(e) *Post*, 321 (b).

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existing state of the business of the Court. . . A bill^(a) was brought into the House of Lords by my Lord Chancellor, with a view of partially opening this Court,—a bill wholly unnecessary and wholly uncalled for, if the warrant had already had the effect of legally opening this Court. That bill passed the House of Lords with little comment; it came down to the House of Commons, where neither her majesty's attorney-general nor any other member thought fit to take it up, and the bill, therefore, fell to the ground. Those members who were adverse to the bill, who thought it altogether uncalled for, could not consistently take up that bill. Any member who thought that the bill was correct in its principle or convenient in its details, might have taken it up; it however fell to the ground.

Thus, the law officers of the crown have abandoned the legality of that warrant,—the legislature has had an opportunity of interfering during the last parliament, and it has not so done. The serjeants have now, therefore, discharged their duty of obedience and respect to the crown. They have afforded every opportunity of consulting the supposed convenience to the public; and, having furnished those opportunities, they now respectfully call upon your lordships to vindicate the constitution of this Court, and to act in obedience to the acts of parliament^(b), and, as we humbly and most respectfully submit, to that view which your lordships will take of your own duty.

The rank of serjeant in this Court is as ancient, and depends upon the same principles, if I may respectfully say so, as the authority under which your lordships act. No evidence can be found of the existence of this Court, or of the authority of the judges of this Court, which negatives the existence of the serjeants as a co-eval body. The office and character of serjeant is as ancient as the law itself. As members of an ancient Court of justice, honoured with a certain relation to or connection, or title in common with, your lordships, the serjeants, independently of any question of personal interest, considered that an attempt to alter the constitution of the Court by an effort of prerogative imposed upon them the duty of seeing that, if it was proper the Court should be opened, it should be opened by legal and constitutional authority, and not by a precedent which went to shake the foundation and constitution of every Court in Westminster Hall, and throughout the country. They act upon that principle now, but they have the satisfaction of perceiving that those

(a) *Ante*, 313.(b) *Post*, 321 (b).

views that induced the learned judges of 1755 to abandon the bill, under the impression that public convenience did not require that it should pass, have been confirmed by modern experience. Every Court in Westminster Hall, both of law and equity, is struggling to maintain a separate and independent bar; every Court desires it, all professional men are agreed upon its expediency in justice to the public, but in the face of this, in the Common Pleas, where there is a separate bar, it is proposed to create that evil which exists in other Courts, and to make this an open bar. I appeal to your lordships, I appeal to my learned friends who hear me, if during the period of innovation which has prevailed, public convenience has been found to be promoted. We have the satisfaction of applying to your lordships to resume the legal, antient and constitutional course, with a conviction that it will be now found upon experience to be that course which best answers the public convenience. If we are desired to wait, I ask for what? Is it fitting that we should wait and pray of her majesty to recall that warrant? As a member of the Court, feeling for its honour, and as one devoted to the constitution, I should consider that such a course was a degradation to the Court, that it would establish a precedent that went to shake the very foundations of the judicial tribunals of the country. The legality of the warrant as a foundation for opening this Court is abandoned. Your lordships are required by acts of parliament, repeated and repeated again, beginning as early as the reign of Edward III. (a) to "attend to no letters (b), whether under the great seal or the

(a) For a curious instance of interference by letters on the part of Henry III., to stay a suit respecting land which he had given to his sister, and which Henry I. had given to his mistress, see *Pésta de Nevill*, 362. "Walterus de Gaunt tenuit Stanand, Edelberg et Haneb'g (Lincolnshire), scilicet feodarium militum; et Rex Henricus primus cepit istas terras pro voluntate sua de dicto Waltero, et tradidit eas cuidam sorori dicti Walteri, cum qua idem Rex sequit voluntatem suam, ad se sustinendam in vita sua tñ ista fuit mortua tempore Regis Henrici secundi. Et idem Rex dedit dictam terram cuidam cognomine de Roche. Ita quod Gilbertus, pater istius Gilberti, Agn' de la Roche, usque ad iudicium et mortua fuit ipsa vite iudicium determinatum; [qu. the meaning of this clause:] quam idem Gilbertus implacitavit quousque idem Rex prohibuit placitum per breve suum. Post mortem dictæ Regine dominus Rex tradidit dictas terras Stephano de Segrave, que Gilbertus de Gaunt, pater istius Gilberti, implacitavit usque ad mortem ipsius."

(b) The first of these statutes is 2 Edw. III. c. 8 (cited *ante*, 90, as 2 Edw. II. c. 8); enforced by 5 Edw. III. c. 9; 14 Edw. III. st. 1, c. 14; 20 Edw. III. c. 1; 25 Edw. III. st. 5, c. 4; 42 Edw. III. c. 3; 11 Rich. II. c. 10; and 16 Car. I. c. 10. So in the Parliament Roll of 4 Edw. III. 2 Rot. Parl. 60 a, we find the

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privy seal, in disturbance of the common law or common right, but that your lordships shall proceed to hold your Courts as if such letters, threats, or commandments had not come." And your lordships will bear in mind that, (it being perfectly well known that no security arises merely from written law, but that the security depends upon the execution of those laws,) in order that the crown might not be able (if in other times than those in which we have the happiness to live, the crown should desire) illegally to extend prerogative, to protect your lordships from such apprehension you are sworn in express terms not to attend to letters from the crown, but to observe the requirements of the statutes.

I, therefore, have to call upon your lordships to hold this Court according to its antient usage, as required by the acts of parliament which your lordships are sworn to observe. No man has yet expressed an opinion in favour of the legality of that warrant; I have reason to think that no man entertains any doubt upon the subject (a). The question therefore is, what is the course which English judges are to pursue in such a case as the present? Your lordships must be satisfied that under an illegal warrant, an attempt has been made to open the Court. If there be any security in the integrity of judges for the existence of Courts, the time when the public interest calls for those qualities to be put in execution, is upon an occasion like the present, and of all others the most propitious, when the crown itself is satisfied that it has been misadvised, and has inadvertently issued that warrant for which there is no foundation. It cannot be supposed that the attorney-general and solicitor-general would appear at that august tribunal, to which I allude, without communicating with the crown, and expressing to the crown, as its law officers, what their impression was. Then shall it ever appear upon the records of the Court, that your lordships having received a warrant, which by the common consent of Westmin-

following entry: "Also inasmuch as our lord the king wills that the laws of the land be maintained, and that right be done to all, as well poor as rich, therefore (si) has the lord the king commanded that his justices of the one bank and of the other, and his justices to take assises and deliver gaols, and all other his justices whatsoever, to do right to all for writ of the great seal, or letter of the signet (lettre de la targe), or other letter or command whatever, nor for prayer of any, spare or omit to do right to all according to law and the custom of the realm; and therefore let writs be sent to the same justices." And see further as to "lettres de la targe," *ib.* 83 b, 86 b, 224 a, 415 a, 458 b; 3 Rot. Parl. 529 a. And see P. 4 Edw. IV. fo. 16, pl. 29; *ante*, 211, 212, 244.

(a) *Sed vide post*, 328.

ster Hall is utterly illegal (a), continue to act upon it after its illegality is manifested, till the crown voluntarily recalls it? Shall it appear that after the arguments that have taken place, after a bill brought into parliament, evidently upon the knowledge and confession, that this Court has not been well and legally opened, your lordships, with the knowledge of that illegality, go on and give effect to that exercise until the crown shall recall it?

The dispensing power has long gone by. What, if that be illegal, warrants the Court in dispensing with the law, as I am satisfied your lordships hold it? If, therefore, I was aware that the Privy Council would next week advise the crown to recall that document, I should still say that the last course which this Court ought to take, is to announce to the public, that the illegal exercise of prerogative will be maintained here until the crown shall voluntarily recall the illegal act.

I submit, that waiting for the recall of that document, is by no means the respectful and proper course to the crown. Your lordships are well aware who the noble person was who held the great seal when that warrant issued. I cannot therefore have a better authority as to the mode in which that warrant should be dealt with, than that noble lord's opinion. I beg, therefore, to refer your lordships to the public declaration of that noble lord. "I think the most respectful course for all Courts, and for all judges, to take towards the crown, as well as towards the subject, is to do their duty, and to treat an illegal order as a nullity, if they do it legally, and not to wait till the crown shall revoke the order (b)." That was the opinion of the Lord Chancellor by whom the warrant in question was communicated to your lordships, and it is a constitutional and a correct opinion. [Tindal, C. J. That was upon a case in the Court of Chancery.] No, my lord. That was said by Lord Brougham in the hearing of your lordships and of the Council. [Bosanquet, J. During the argument?] Yes, my lord, upon its being suggested that the Court of Common Pleas ought to wait for some intimation of the crown, says, "The most respectful course for all Courts and for

(a) One of the objections taken to the validity of the warrant of 1834 in point of form was, that it was not countersigned, (*ante*, 105). The necessity for countersignature seems to be as old as the reign of Henry IV. "Et que billes a endorserz par les chamberleins et lettres dessous le signet de nostre dit seignor le roy, a adresserz, et autres mandemens a doner, as Chancellor, Trezorier, et Gardeyn du Prive Seal, et autres officers queconques, desore en avant, en tiels causes come desuis, serront endorsez ou faites par advis du Counsaill." 7 & 8 Henry IV. (1406); 3 Rot. Parl. 572 b.

(b) *Ante*, 103. And see *post*, 328.

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all judges to take towards the crown, as well as towards the subject, is to do their duty, and to treat an illegal order as a nullity if they do it legally, and not to wait till the crown shall revoke the order." That was the opinion of the Lord Chancellor who issued that warrant,—a constitutional opinion. The crown in this case did not seek your lordships' assistance in either creating or enforcing a claim of prerogative, not well founded in law. It came to your lordships in a constitutional spirit, though in a mistaken view of the law, but it came to your lordships with a confidence that the subjects of the country would find their security in your lordships' knowledge of the law, and in your honest and firm maintenance of it. That must have been the first object; and he knows little of the respect due to the crown, or the estimation in which it should be held, who can suppose that, in this day, the wish should be that a claim of prerogative, inconsistent with law, should be enforced by any of the superior Courts of Westminster Hall. The first care of the sovereign must be, that the law should be upheld and maintained by those tribunals upon which we depend for all that is dear and valuable.

But is it a courteous thing to wait and expect that her present majesty should be called upon to retaliate an act of his late majesty William the Fourth? Is it not enough that the learned judges are called upon to decide it? Can any man suppose that it is a mark of respect to the crown, to ask for that to be done which cannot be a pleasing duty, namely, to recall, as an illegal act, something done by a royal predecessor? As regards the character of this Court, founded by acts of parliament, it is of the utmost importance that this matter should be decided, not upon the authority of the crown, commanding the revocation of that warrant, but by your lordships vindicating the spirit of the common law of the country. As a matter of courtesy, and duty, and respect to the crown, the last thing it should be asked to do, the last that should cause a delay in the administration of justice, is the desire that her present majesty should be put in the situation of recalling, revoking and expressing her disapprobation of an act of his late majesty King William the Fourth.

The case stands therefore in this position: The sergeants have performed their duty of respect to the crown, by having cautioned the crown to be satisfied of the illegality of the warrant before they appealed to your lordships, the proceeding before the judicial committee being entirely extra-judicial as regards your lordships, the duty being one which we performed of our

own motion, and with a view to our public or private duty to her majesty; but wholly unconnected with any judicial proceeding. We having satisfied those feelings of duty and respect, and the crown having publicly rejected that document as a legal foundation for the opening of the Court; and your lordships having said, the lord chief justice having said, that the judges of the Court had not themselves made or intended to make any alteration, but that they had obeyed the king's warrant, and under that warrant had acted, now that your lordships' attention has been more maturely called to the subject, it is to be seen (and I know that no just expectations will be disappointed) whether now that your lordships see that obedience to that warrant was illegal; was unconstitutional, your lordships will continue a practice so inconsistent with law, and so inconsistent with the ancient constitution of the Court.

No rank, no dignity, no office in the kingdom, stands upon a better title than the rank and office and dignity of serjeant-at-law. If that can be defeated—if the rights and privileges which attach to it, which form a part of the office itself—can by the sign manual be destroyed and taken away, or if the Courts are not bound to maintain their privileges, which are as ancient as any to be found in the kingdom, I say the peerage—I say the honours—I say the offices; and all that is important in the civil state in this country, is at the mercy of the crown. However safe they may be in the general, in the present day, the law looks to security in days that are evil, and not in days that are full of peace and of honour. Calling therefore the attention of the Court to the illegality of that warrant as confessed, no man standing up to defend it—to the statutes—and, respectfully and humbly, to the terms of your own oaths, I call upon your lordships to restore the ancient constitution of this Court; and, in the name of the serjeants, I most respectfully protest against any barrister being allowed to practise here, not of the degree of the coif.

If your lordships think it possible, by any waiver or consent, or any other course by the serjeants, that the gentlemen, who are concerned in business already commenced, can be heard during the remainder of that business, the serjeants are not only willing, but most anxious to acquiesce in such an arrangement; but in so saying we cannot but perceive that the very suggestion supposes that your lordships can dispense with the law and your oaths; and that, in order to get rid of a temporary evil, you may create a precedent full of danger and full of mischief. If any other course, such as hearing arguments in Serjeants' Inn Hall,

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or elsewhere, as was antiently practised, or any other course could be adopted that occurs to your lordships, consistent with the law, and consistent with integrity to the Court and the public, we are most willing. Having looked at this matter anxiously, we are however apprehensive that no legitimate course of that kind is open; but we should feel relief if, in the wisdom of your lordships, any such course could be pointed out. We therefore, in conclusion, pray your lordships to attend to the constitution of this Court, to attend to the state of the common law, upon which it is built, and to bear in mind that the same power which opens a Court can close a Court; and that those who allege that convenience would arise from its being opened, and who are willing to recognize the power of the crown to effect that object, must do so with the recollection, that if political times of another aspect should arise, the same power could close a Court, and exclude those advocates upon whom the public interest rested. The effect of tampering with antient courts of justice is not to be measured by this or that instance. Most usurpations begin in measures which are popular; but establish the precedent, and the safety of the constitution is gone, and mischief follows such as no man could foresee.

I, therefore, thanking your lordships for having heard me so patiently, now beg your lordships to call upon the serjeants, and serjeants only, as advocates in this Court.

TINDAL, C. J., after conferring for a few minutes with the three other judges (a), said, "Brother Wilde, the subject matter of your representation to us is one of very deep importance, both as regards the constitution and practice of the Court, and the interests of the public. It requires, therefore, serious consideration on our part, before we can make any reply to the address which you have made to us. We shall give it our earliest attention, and make you, and the rest of the gentlemen of the bar, acquainted with the opinion which we form upon the subject. In the mean time it is hardly necessary to say that the practice of the Court will be continued as it has lately been."

No. LXXXIV.

At the sitting of the Court of Common Pleas, Monday 25th November, 1839 (b),

(a) Bosanquet, Coltman, and Erskine, JJ.

(b) Being the last day of Michaelmas term.

TINDAL, C. J. said, Brother *Spankie* (a)—With respect to an application made to the Court upon the first day of the present term, by my Brother *Wilde* (b) upon the subject of the right to the exclusive privilege of serjeants to be heard, and to practise in the Court of Common Pleas, notwithstanding the warrant under the sign manual of his late majesty (c), we have given the matter very full consideration, and have resolved upon the course we intend to pursue.

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Judgment in
favour of appli-
cation of *Wilde*,
Sert., to close
the Court.

Upon the first day of next term, or in case from particular circumstances I shall be absent (d) upon that day, then upon an early day after I return, in case any gentleman at the bar, not being of the degree of the coif, shall be present in Court, I shall not call upon him to move; but if at that time the gentleman so passed over shall be disposed to offer any observations as to the right of himself and other barristers, not being of the degree of the coif, to be heard, we shall be ready to hear him, and receive any information upon the subject; and either upon that day, or in case the observations we hear, require further consideration, then upon some future day, we shall declare the course we think it right to pursue, and the reasons upon which it is founded.

In the course of the day Mr. *Kelly*, Q. C., said, Will your lordships permit me to inquire, in reference to the communication which your lordships have made this morning, on the motion of my learned friend, Mr. Serjeant *Wilde*, if it is in the contemplation of the Court, supposing the more recent practice should ultimately be altered, and the ancient practice restored, to make any order or arrangement in reference to matters which are now pending before the Court.

Application by
Kelly as to
business already
pending.

TINDAL, C. J.—What you mean is, as to those learned counsel who have received their instructions,—whether we mean to make any alteration as to such cases.

Kelly.—I was not about to call upon the Court to make any intimation on that subject; but not seeing any gentleman at the bar, not of the degree of the coif, my senior, I venture to mention the matter to the Court, for it will be in the recollection of your lordship that there are many actions of great importance pending in the Court, in which other counsel, not of the degree of serjeants, are engaged.

TINDAL, C. J.—That has not escaped our observation. We will do what is just, you may depend upon it.

(a) The senior queen's serjeant present.

(b) *Ante*, 316.

(c) *Ante*, 2.

(d) His lordship appears to have had in view the special commission.

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No. LXXXV.

Court of Common Pleas closed.

On Monday, 20th January, 1840, being the first day on which the Chief Justice appeared in Court after his return from the Special Commission at Monmouth, his lordship, after hearing the motion of the serjeants present in Court, ordered the peremptory paper to be entered.

Application by *Newton* for a reconsideration of judgment for closing the Court.

At the rising of the Court, Mr. *Newton* asked the Court whether, for the future, barristers were to be excluded from the advantage of being heard in the Court of Common Pleas. Upon receiving an answer in the affirmative from the Lord Chief Justice, Mr. *Newton* requested to be heard on his right to the advantage of audience and of pleading in this Court. Leave being granted, Mr. *Newton* contended, first, that the privilege of serjeants being conferred on them by royal mandate in the form of a writ, their rights stood upon the same ground as those of the barristers who have, since 1834, practised in the Court of Common Pleas under the royal mandate contained in the warrant of 24th April, 1834 (a); that the Court, by ordering the warrant to be recorded, adopted it, and acknowledged its legality; that every person called to the bar since that period must be considered as called to the bar of this Court as well as of the other Courts (b); that persons may have entered themselves at the Inns of Court, and expended considerable sums, with the special view, and upon the confidence, of being admitted to practise at the Common Pleas bar; that the serjeants had been guilty of laches in not sooner asserting their rights; that upon the accession of Her Majesty the serjeants had petitioned for a revocation of the warrant, that the petition had been referred to the Privy Council, where the petitioners were unsuccessful, and that the Queen did not think proper to revoke the warrant, evidently considering that it was more for the benefit and advantage of her subjects that the bar of England should continue to enjoy the privilege of audience and pleading in this Court: that the serjeants had procured (c) a bill (d) for closing the Court, under the name of a bill to open it, to be introduced into the House of Lords, but

(a) *Ante*, 2.

(b) A student is called only to the bar of that inn of court of which he is a fellow. In consequence of being called to the bar of an inn of court, he is received at the bar of the courts of law.

(c) There appears to be no reason to believe that any serjeant was consulted upon the bill brought in by the Lord Chancellor, *ante*, 313.

(d) *Ante*, 313.

that though it had passed that House, it could find no support in the Commons; that the serjeants having abandoned their bill from an apprehension that it would be rejected by the Commons, and not till then, made the application to this Court to exclude the barristers from advantages which, with the sanction of the Court, they had enjoyed for five years; that the universal impression throughout the country was that it was advantageous to the suitors to be allowed to have their causes advocated by any counsel they might think proper to select; that it had been suggested that if the warrant of 1814 was within the limits of the royal prerogative, the Crown would possess the power of directing that every person without distinction might be heard and practise in every Court, but that it was not respectful to the Crown to suppose so manifest an absurdity; that even in the case supposed, it would have been difficult for the Court to exclude the public after an enjoyment of the right of audience, without question, during five years; that the judges of this Court have acknowledged the power of the Crown to throw open the Court, and that they ought to pause before they closed the Court upon so numerous and learned a body as the *outer* bar of England.

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TINDAL, C. J.—The observations which you have made are extremely proper, and they shall have due consideration.

On the following day (a), at the sitting of the Court, TINDAL, C. J. expressed himself as follows:—

In the matter of the serjeants at law a question has been raised before us as to the validity and legal effect of a warrant under the sign manual of his late Majesty, subject to some exception in point of form, ordering and directing that the right of practising, pleading and audience in the Court of Common Pleas, during term time, should, from the first day of Trinity term, 1834, cease to be exercised exclusively by the serjeants at law, and that upon and from that day barristers at law might have and exercise equal right and privilege of practising, pleading and audience in the said Court with the serjeants at law. We have been called upon by the learned serjeants, who have joined in the application, to declare our opinion on a question which affects so nearly their interests, and to act upon such opinion.

Judgment of the Court on Newton's application.

At the time when this warrant from his late Majesty was openly read in Court in the presence of all the serjeants, if any one of our learned brethren had expressed a doubt as to its validity or legality, and had desired the opinion of the Court upon

(a) Tuesday, 21st January, 1840.

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that point, we should have felt it our duty to pause before we gave effect to the warrant, and should have given our deliberate opinion upon the objections which then might have been urged in argument against it. But no such doubt was then suggested. Indeed, a large number of serjeants accepted under the warrant the grace and favour of the Crown in making their rank permanent; and these of our brethren who had previously obtained their rank from the Crown, and who are now the only parties to the application, allowed the matter, at that time, to pass sub silentio. Under these circumstances it cannot be wondered at that the Court did not, of its own authority, interpose any objection to the warrant; more especially as the object which the warrant had in view, that is, the opening of the Court of Common Pleas, was that which the Common Law Commissioners had, by their report, previously recommended to be adopted for the benefit of the suitors, though certainly to a much more limited extent than the warrant itself directed. Still however, notwithstanding that the period of acquiescence under the operation of this warrant has been considerable, we see no legal ground upon which those who have joined in the application can be held to be barred in their right to call for the opinion of the Court upon the validity of the warrant. We think ourselves bound, in the execution of our duty of administering justice, not only to the suitors of the Court, but to the officers and ministers of the Court, to declare our judgment upon the legal effect and validity of the warrant in question, when called upon so to do.

Now we think the question before us turns upon the single point whether the serjeants at law have, by the constitution of the Court, and consequently by law, held and enjoyed the sole and exclusive privilege, by virtue of their office or degree of serjeants, of practising, pleading and audience in the Court of Common Pleas: for if they are so entitled, we think they cannot be deprived of it by a warrant from the Crown under the sign manual, nor indeed by any power short of an act of the whole legislature. That the antiquity of the state, degree and office of a serjeant at law is as early at least as the existence of the Court itself, is evident from all the text writers and records which bear upon the question. They are mentioned in the "Mirror of Justice," a book of great authority, and of the earliest, though uncertain, antiquity,—by Bracton; who wrote in the time of Henry the Third,—and in records which are to be found in the Tower, in the time of Edward the First. They are called to the state and degree of serjeants by writ, which of itself is a

strong argument for the antiquity of their office, such writ being found in the most ancient manuscript Registers, and, in substance, agreeing with the writ by which they are called to that degree at the present day. By their oath of office, which has existed from the earliest time, an oath by which no other barrister is bound, they bind themselves to give due attendance for the service of the king's people in their causes. As early as any authentic records exist, the serjeants are found to be practising in the Court of Common Pleas; and there is no evidence of any other barristers being allowed to practise or plead in that Court, among the various authorities collected in the speech (a) of the Lord Commissioner Whitlocke to the newly-created serjeants, in his Memorials, p. 356.

We therefore think ourselves justified in saying, that from time immemorial the serjeants have enjoyed the exclusive privilege of practising, pleading, and audience in the Court of Common Pleas. Immemorial enjoyment is the most solid of all titles; and the warrant of the crown can no more deprive a serjeant, who holds an immemorial office, of the benefits and privileges which belong to him, than it can alter the administration of the law within the Court itself. The rights and privileges of a peer of a realm stand upon the same foundation, immemorial enjoyment; we hold, therefore, that the right of the serjeants to the sole and exclusive privilege which they claim, is still in existence, notwithstanding the king's warrant; and we feel ourselves bound, in the due course of administering justice, to allow such right to be still exercised.

Extreme cases may certainly occur in the progress of time, in which the Court may be called upon, for a time at least, to admit others to plead and practise, until the circumstances which created such necessity have passed by, in order to prevent a failure in the administration of justice to the queen's subjects, for whose benefit all courts of justice were instituted. *Littleton*, J., in the case of *Paston v. Serjeant Gennery*, in the Year Book of the 11th. of Edw. IV. (b), says, "If all the serjeants were dead, we could hear the apprentices to plead here by necessity, and in ease of the people." To which *Bryon*, Chief Justice, answered, "Then, according to you, no serjeant shall be made of necessity." And it appears to us upon the present occasion, that as the serjeants have, by their own voluntary acquiescence, under the legality of the warrant which they now dispute, induced the suitors of the Court to retain as counsel in this Court, during

(a) See this address at length, *ante*, 214.

(b) *Ante*, 214.

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term time, barristers who are not of the degree of the coif, it would be against reason and justice that such suitors should not have the full benefit of the services so engaged by them. Whilst, therefore, we declare our opinion to be, that under the constitution of the Court we ought to allow the serjeants the exclusive liberty of practising, pleading, and being heard in this Court during term-time, it is with this reserve, that all those barristers, who are not of the degree of the coif, shall be heard in such business as they are at present engaged in until the same be brought to an end.

I wish to add, that although my learned Brother *Maule* was not present at the time this was mentioned and argued by my Brother *Wilde*, he does not dissent from the opinion I have given, and I have the authority of my Brother *Coltman* for saying that he entirely approves of it.

Protest.

At the rising of the Court, Mr. *Newton* applied for leave to enter, on the files of the Court, his humble protest against the decision upon the privilege of pleading and audience at the Common Pleas bar.

TINDAL, C. J.—No; we cannot allow that. It is quite unprecedented that such a protest should be entered against any judgment; it is quite out of all rule.

No. LXXXVI.

On the 23rd January, upon a rule for a new trial being called on,

Sir *F. Pollock* said—I understand the Court to have heard a gentleman on the subject of the recent arrangement in this Court. Probably your Lordship will allow me to state personally, that I am extremely happy your Lordship has made the arrangement that has been promulgated; for I think it is of great importance to the dignity of the Court (a), and the convenience of the suitors; and, I would say, so far as my own feeling is concerned, the respectability of the bar.

Motions for new trials.

I would now ask whether, as it has been customary for gentlemen not of the degree of serjeant, to practise at Nisi Prius (b), those gentlemen will be permitted to move for new trials in this Court in cases where they have held briefs at Nisi Prius, which has always been the practice since I have been at the bar.

(a) *Vide ante*, Preface.

(b) *Vide tamen ante*, 233 (f).

TINDAL, C. J.—The right of counsel to practise at *Nisi Prius* has existed at all times (a); but he cannot practise in this Court in term-time, as the Court is at present constituted.

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Sir F. Pollock.—I beg to state that I receive respectfully your Lordship's decision on the subject. There is a matter which has been appointed for this morning, as to which I feel bound to state the manner in which I have been concerned. My instructions have been given since this term began, in consequence of the absence of my learned friend the Solicitor-General.

TINDAL, C. J.—Were they given before last Monday? (b)

Sir F. Pollock.—Yes, my Lord.

TINDAL, C. J.—That is the dividing line.

No. LXXXVII.

On the 29th January, Mr. Addison addressed the Court to the following effect:

It is understood in the profession that queen's serjeants, queen's counsel, and serjeants having a patent of precedence, do not *sign* pleas (c). All the serjeants in this Court are gentlemen who have precedence; for I do not understand that they give up the legality of the warrant, so far as it conferred on them that precedence. Under these circumstances, gentlemen in my situation are anxious to know what is to be the course in future in that respect.

Drawing and signing pleas in Common Pleas.

BOSANQUET, J.—King's serjeants always used to sign pleas in my early days.

(a) *Vide tamen ante*, 238 (f). (b) *Vide ante*, 329.

(c) The usage appears to be, that gentlemen holding the rank of queen's serjeant or queen's counsel, or having patents of precedence, do not draw or sign pleas, unless a junior be also employed. That condition of professional etiquette being complied with, pleas are drawn, without objection, by counsel holding rank. Drawing pleadings in conjunction with juniors is generally called *settling* pleadings. The reason why, in practice, pleas were, before the warrant of 1814, signed by king's serjeants, and not by king's counsel, appears to be this, that in pleadings in the Court of King's Bench, or in the Court of Exchequer, the signature of the junior was sufficient, whereas, in the Court of Common Pleas, the signature of the junior was not sufficient, unless that junior were himself a serjeant; but as the professional usage did not require that the junior employed with a king's serjeant should be a serjeant, it seldom happened that a king's serjeant, who settled pleadings, had with him a junior qualified to sign pleadings in this court.

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Addison.—If we are excluded, and if that be so, then the Court are in this curious condition, that there is no gentleman in it to sign pleas.

TINDAL, C. J.—I do not know why they should not sign pleas.

BOSANQUET, J.—I remember when king's serjeants used to justify bail.

Addison.—I do not know how a party who refuses to draw a plea is to sign it; however, I have not ventured to sign a plea since the judgment of your Lordship, out of respect to the Court. I wish to know what the practice is to be.

TINDAL, C. J.—The practice stands exactly as it did before that supposed warrant issued. You may *draw* as many pleas as you please; we can only see that pleas are *signed* by a serjeant. A party himself may *draw* his plea (a).

No. LXXXVIII.

Special case.

On the 31st January, the last day of Hilary Term, *Newton* applied to the Court to grant a special case, with a view to bringing the question of exclusive pleading and audience before the highest tribunal (b).

TINDAL, C. J.—There is no such thing. It is not a matter of justice between us; it is a matter of regulation; and we will not allow ourselves to be made parties to any appeal to a higher tribunal.

(a) The refusal of the Courts in Westminster Hall to receive special pleas, &c. without the signature of counsel, seems to be the only trace now remaining of the ancient practice (*vide ante*, 268) of not bearing parties in the superior Courts, (in which the pleadings were in French,) except by counsel. In part of the Duchy of Normandy, in which the old customary law is still partially in force, a similar practice continues.—“Afin d'éviter la confusion, et faire que le droit d'un chacun soit dûment établi, personne ne sera reçu à plaider sa cause sans avocat.”—Laws of Jersey, as approved by Order of Council of 28th March, 1771, *title Avocats*, p. 3.

(b) By what process it was proposed that a special case should be removed into a superior Court, does not appear.

THE END.

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